Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

James H. Dickey, Petitioner

v.

City of Hartsville, et.al., Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not officers of the United States District Court and its Judicial Administrative staff have the power and authority to redirect and reassign active cases to a particular Judge after the litigation proceedings has commenced without official order of the court; and does such reassignment violate the due process and equal protection clause of the United States Constitution so as to render any subsequent judgments therefrom void.

2. Whether or not a District Court Judge has the power, authority and discretion to direct an independent action for relief to his chambers for adjudication without an official order and notice to the litigants; and does such conduct represent a judicial abuse of power and violate the equal protection and due process clauses of the United States Constitution.

3. Whether or not a District Court Judge who exercises the power, authority and discretion to, sua sponte, transform an independent action for relief into a Rule 60 (B) motion for his reconsideration prior to conducting an evidentiary hearing on the merits violates a litigants rights of procedural due process and equal protection; and thereby render the judgment void.

4. Whether or not the doctrine of Res Judicata prohibits and effectively bar any further pursuit of a Sec. 1983 civil rights action under Rule 60 (B) F.R.C.P., wherein the summary judgment order is (allegedly) secured as a result of fraud, misrepresentation and excusable neglect.

5. Whether or not a District Court Judge violates the clearly established law of due process by proceeding in light of a timely motion for his recusal to rule on other matters and motions before the court, wherein his pervasive bias and judicial misconduct is alleged and supported by affidavits, so as to make the motion for his recusal moot.

6. Whether or not a non-moving party is prohibited from offering testimony under oath in lieu of his deposition on the same evidence in a summary judgment proceeding to defeat the claim of a frivolous action meriting the award of attorney fees.

7. Whether or not the Court of Appeals and District Court can ignore the required guidelines for (granting) attorney fees and cost pursuant to 42 U.S.C. sec. 1988 in an unpublished opinion in direct conflict with its published opinions.

8. Whether or not the District Court and Court of Appeals may properly deny a motion to correct and/or supplement the record of a case where the official records and documentation on file with the court and/or custodian of the official court records are in legitimate and genuine dispute according to the clerk's docketing statement; and does such refusal violate the litigant's right of procedural due process and equal protection.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

PETITIONER: James H. Dickey D.B.A. Dickey's Business Enterprise; proceeding Pro se; Post Office Box 2405, Atlanta, Georgia 30301

RESPONDENTS: The City of Hartsville, Members of the City Council, Willie D. Herbert, individually and in his official capacity as City Building Inspector, Business License Inspector of the City of Hartsville, William F. Bruton, Jr., individually and in his official capacity as City Manager of the City of Hartsville, and Matt Canarella, individually and as Mayor of the City of Hartsville, all members of City Council for the City of Hartsville during the 1991-1996 Term Year(s); Willcox, McLeod, Buyck & Williams,P.A.

The Attorneys of Record are L. Hunter Limbaugh and Robert T. King, of the law office of Willcox, McLeod, Buyck, Baker & Williams, P.A., Post Office Box 1909, Florence, S.C. 29503.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

James H. Dickey, the petitioner herein, respectfully prays that a Writ of Certiorari issue to review the consolidated judgment and opinion of the United States Court of Appeals For the Fourth Circuit entered on June 18, 1998; the Petition for Rehearing with Suggestion For Rehearing in Banc in this matter denied on July 20, 1998.

OPINIONS BELOW

The June 18, 1998 unpublished per curiam opinion of the Court of Appeals No. 97-2434 and 98-1117, whose judgment is herein sought to be reviewed is represented and provided in the appendix to the petition, pp. 27. The District Court's unpublished opinion is reprinted at pp. 33. The petition for rehearing is reprinted at pp. 51.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1998. The petition for Rehearing was denied and entered on July 20, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. 1254(1).

CONSTITUTIONAL AND STATUTORY REGULATIONS INVOLVED

This case involves Section 294-296 of the United States Code regarding the power of assignment of retired Justices or judges to active duty; and may be found at 28 U.S.C.A. Section 294-296. In pertinent part it requires:

" that no retired Justice or Judge shall perform judicial duties except when designated and assigned by the Chief Judge or Judicial Council of his circuit."

This case involves section 471-82 of the Judicial Improvement Act of 1990; which may be found at 28 U.S.C.A. Section 471-482; and in pertinent parts requires:

> "that each United States District Court implement a plan.....to facilitate deliberate adjudication of a civil case on the merits...improves litigation management and ensure just, speedy, and inexpensive resolution of civil disputes."

This case also involves the first section of the Fourteenth Amendment of the Constitution of the United States, which provides as follows:

> "All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws."

This case involves the savings clause of Rule 60 (B), F.R.C.P.; which may be found at 28 U.S.C. Rule 60; and in pertinent parts provides that --- this rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding ---- or to set aside a judgment for fraud upon the court.

STATEMENT OF THE CASE

The facts necessary for an understanding of the issues presented by this petition are as follows: On May 11, 1993 this Civil Rights 42 U.S.C.A. Section 1983 and 1985 etc. action was filed in the United States District Court of South Carolina- Columbia Division. This action was commenced by the petitioner who was a victim of property damage sustained by Hurricane Hugo in 1989 when in attempt to repair his business property was confronted by certain city officials who in conspiracy with certain local contractors attempted to extort construction contracts and money from this Black businessman via the selective and discriminatory enforcement of various city codes and ordinances. After the action commenced the respondents sought to destroy and/or misplaced the evidence (records and documentation) reflecting the activities of certain city officials during this period of repair and natural disaster (e.g. Hugo).

This action was randomly assigned to a Black United States District Court Judge who took control of the Pre-Trial proceedings from the Magistrate judge (after substantial pre-trial litigation disputes regarding discovery and the destruction of documents) and ordered the case ready for trial before him by February 1, 1996 with all discovery and dispositive motions to be filed and completed by January 1, 1996.

Approximately two weeks before the date set for trial, the case was reassigned to another Judge without order of the court. The petitioner objected to any reassignment of his case without a hearing and argued that since the case was on the current trial calendar of one Judge any reassignment given the late posture of the litigation would be prejudicial to his case and give rise to an appearance of impropriety. The petitioner therein sought a continuance in the district court,

and a writ of mandamus and prohibition in the appellate courts. They all were denied.

On January 31, 1996, the Defendants filed a dispositive motion for summary judgment before the reassigned Judge. The case was set for trial before the reassigned Judge and without notice to the petitioner, the court proceeded at the trial roster meeting to hear Defendants Motion for Summary Judgment over the Petitioner's objection and first request for a continuance. The court refused to allow the petitioner as the Pro se litigant to give testimony under oath to contravene affidavits of the Defendants and alleged co-conspirators. The District Court thereafter granted Summary Judgment to the Defendants.

The Court of Appeals for the Fourth Circuit affirmed the decision of the District Court and while in the process of petitioning for a Writ of Review to the United States Supreme Court, the petitioner discovered that the record for appeal did not include the depositions represented as filed in the court by the defendants as custodians of these official records.

The petitioner thereafter opted to file an independent complaint for relief from the judgment alleging fraud, misrepresentation and excusable neglect against the defendants and the Willcox Law Firm for improper conduct in securing summary judgment.

The District Court Judge who issued the summary judgment order, thereafter granted an order of attorney fees to the defendants and directed the independent action, without notice to the litigants, to his chambers for adjudication notwithstanding a motion for his recusal. The District Court Judge, sua sponte, dismissed the independent complaint for relief under the Doctrine of Res Judicata. The Court of Appeals affirmed the decisions of the District Court on June

18, 1998. And, upon denial of petitioner's request for a rehearing, This petition for Writ of Review to the Supreme Court follows.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to safeguard and protect the integrity of the Federal Judiciary and supervise the manner in which cases are reassigned after the litigation process has commenced once a District Court Judge assumes senior status.

Court officials, judicial officers and the administrative staff of the U. S. District Courts have a continuing duty to safeguard the integrity of the federal judiciary and under Rule 1 of the Federal Rules of Civil Procedure to not engage in conduct prejudicial to the effective, just, inexpensive and expeditious administration of the court's business. Constitutional violations and controversy have arisen over the impropriety and prejudicial conduct of court officials and its administrative staff in the reassignment of cases after the presiding Judge assumes senior status.

In the case at bar, reassignment of the case was challenged by a black litigant when a Deputy Clerk attempted to reassign his case from an experienced black district court judge after the intense litigation proceedings had commenced to a white district court judge without an official order of the court. The petitioner objected to any reassignment of his case to a new and inexperience judge without a hearing, and argued that a new judge would not be familiar with the prior court proceedings, prior rulings, and

discovery disputes wherein the assigned Judge had issued standing orders from the bench which had not been reduced to writing.

The petitioner had requested that the assigned Judge reduce his orders to writing, however said Judge insisted that the same was not necessary since he would continue to preside over the trial of the case and be familiar with his rulings until its conclusion. The assigned Judge assumed senior status but continued to hear the cases already assigned to his trial roster. The petitioner received notice of a scheduled hearing before the senior Judge which was subsequently retracted under the guise that the case was going to be reassigned. The petitioner argued that any reassignment of his case would be prejudicial to the fair and expeditious administration of justice and was unnecessary since the litigation proceedings had already commenced; and that the assigned Senior Judge had become closely involved in the litigation proceedings (which was on his trial roster), had issued several orders in regards to the pre-trial litigation matters, including a final scheduling order setting the case ready for trial before him on February 1, 1996, with all dispositive motions required to be filed by January 1, 1996.

The petitioner submits that once a case has been randomly assigned, the judge and court owes it to the oath of office and to the litigants who are the subjects of the jurisdiction of the court over which the judge has regularly presided to not abandon or be abandoned from the position assigned to him unless required by law. See, U.S. v. Orbiz, 366 F. Supp. 628 (D.C. Puerto Rico,1973).

In the case at bar, there was no legal requirement that the black judge be removed from this petitioner's case after the litigation process had commenced without an order of the court. The litigation process had commenced in the case at bar according to the opinion of this circuit; and the court

officials of the District Court of South Carolina could not arbitrarily prejudice the rights of a litigant by a non-judicial and/or administrative act to delay the trial of the case and extend the opportunities for the defendants to file matters (e.g. dispositive motions) in contravention of the standing order of the district court judge.

The Fourth Circuit of the United States Court of Appeals has held that once the litigation process of a case has commenced before the assigned judge that judge is duty bound to continue with the case. See, In Re Virginia Electric & Power Co. 539 F.2d 357 (4th Cir. 1976); Duplan Corporation v. Deering Miliken, Inc., 400 F. Supp. 497 (D.C.S.C. 1975). The petitioner submits that the case was nevertheless transferred in a manner that prejudiced the rights of the petitioner, and that the officers of the United States District Court and its administrative staff does not have the power and authority to redirect and reassign active cases to another judge after the litigation proceeding has commenced without an official order of the court.

The reassignment of cases which violates and infringes upon the Federal Rules of Court, and the prior orders of the court, also violates the protected constitutional rights of a litigant. The due process and equal protection clause under the Fourteenth Amendment of the United States Constitution guarantees a citizen the right to equal and fair access to the courts and equal protection under the laws which governs the state and judiciary. The conduct of the District Court officials in reassigning the petitioner's case after the active litigation process had commenced before the senior judge absent an order of the court substantially departed from the accepted and ordinary course of judicial proceeding. See, Farmhand Inc. v. Lahman Mfg. Co. Inc., 650 F.2d 153 (8th Cir. 1981). There were no valid notice and order of reassignment to support the official conduct of the

district court officials which in effect made itself a party to the underlying alleged discrimination against the plaintiff by the defendants as a governmental entity empowered to carry out the functions of government. See generally by analogy, Edmonson v. Leesville Concrete Co., Inc. 500 U.S. 614, 111 S. Ct. 2077; 114 L. Ed. 2d 660 (1991).

Rule 1, F.R.C.P., and the Judicial Improvement Act of 1990 require that the officials and court personnel of the United States District Courts provide a fair and equitable procedure for reassignment of cases based upon the case status and affected substantive rights of the parties involved. The District Court of South Carolina could not abridge, enlarge or modify the substantive rights of any party litigant via the administration of the court's business by merely arbitrarily reassigning cases off the active trial roster of a Judge without order of the court and in such a manner that prejudice the rights of a litigant.

The District Court in the instant case, in effect enlarged the time limits for filing dispositive motions without proper order of the court, increased the cost of litigation and delayed the trial of the case to give the defendants a decidedly advantage in the court proceedings. The Court of Appeals in other circuits have consistently allowed for provisions in accordance with the Judicial Improvement Act of 1990 for the transfer and designation of cases once a Judge assumes senior status so as to not delay the litigation process or prejudice the rights of the litigants. The Court of Appeals in this circuit fails to address this common circumstance and important issue in Federal Law and Procedure.

A writ of review is necessary for the Supreme Court to establish a consistent provision and ruling by the lower courts in regards to the reassignment of active cases after a presiding judge assumes senior status so as to not prejudice

the rights of a litigant without an opportunity to be heard. The petitioner would argue on appeal, inter alia, that where there is no rational basis or legal requirement to reassign a case to another judge after the litigation process has commenced without a court order, all orders flowing therefrom must be declared void at the insistence of the injured party.

This Supreme Court is called upon to give a careful review to this proceeding and exercise its supervisory powers over the courts to address the district court's violation of the petitioner's constitutional rights to procedural due process and equal protection under the law.

II.

Certiorari should be granted to safeguard the integrity of the savings clause under Rule 60 (B) F.R.C.P. and resolve the conflict of the unpublished opinion with the published opinions of the Federal Courts.

Under Rule 60 (B) F.R.C.P. a new and/or independent action may be brought to relieve a party from a judgment, order or Proceeding secured by the misconduct of an adverse party, by fraud or any other reason justifying relief from the operation of the judgment. Anderson v. Cryovac, Inc., 862 F. 2d 910 (1st Cir. 1988).

Since an independent action may or may not be brought in the same court that rendered the judgment, there is no automatic assignment of the complaint to vacate the judgment to the Judge who issued the order. Locklin v. Switzer Bros. Inc., 335 F.2d 331 (1964). The Federal Courts have consistently held that an independent action may be had in equity to relieve a party of a judgment that may be mani-

festly unconscionable and/or obtained by the misconduct of the officers of the court. Hadger v. Yonkers Racing Corp. 48 F.3d 1320 (2nd Cir. 1985); Transaero Inc. v. LaFuerza Area Boliviana, 24 F.3d 457 (2nd Cir. 1994).

In the case at bar, the order of a District Court Judge egregiously departs from the usual course of judicial proceedings and abuses the discretion of the court in such a manner that it serves only to preclude the introduction and development of evidence which would support a litigant's civil rights claim and/or independent claim for relief. It is violative of the litigants rights of procedural due process and equal protection, to rule on an independent claim for relief under the savings clause of Rule 60 prior to conducting an evidentiary hearing on the merits. It is also a far departure from the accepted and usual course of judicial proceedings to permit a judge in a case not assigned to him, to intervene and interfere with the due course of justice and the litigant's independent claim for relief without proper order of the court.

The District Court and Court of Appeals opinions is silent on this important issue and question of Federal Law regarding the savings clause and therefore conflicts with the relevant decisions on this matter by the Court of Appeals in other circuits. Averbach v. Rival Mrg. Co. 809 F.2d 1016 (3rd Cir. 1987); Robinson v. Volkswagenwerk A G, 56 F.3d 1268 (10th Cir. 1995). This petitioner submits that since Rule 60(B) F.R.C.P. specifically states that it does not limit the power of the court to entertain an independent action to relieve a party from a judgment or order rendered under certain circumstances, no judge should possess the power, authority and discretion to, sua sponte, direct the claim to his chambers and then transform the independent action for relief into a Rule 60 (B) motion for his reconsideration and dismissal. Such conduct infringes upon Rule 1, F.R.C.P., the

Judicial Improvement Act of 1990 and the petitioner's right to procedural due process and equal protection as guaranteed under the Fourteenth Amendment of the U. S. Constitution.

This Supreme Court is called upon to exercise the court's supervisory power to safeguard and protect the integrity of the "Savings Clause" under Rule 60(B) F.R.C.P., to correct the conflict in the decisions in this circuit and other circuits, and to address the District Court of South Carolina's violation of the petitioner's constitutional right to procedural due process, and equal protection under the law.

The petitioner would argue on appeal that since Rule 60(B) F.R.C.P. permit a party to bring an independent action for relief from a judgment in either the same court or a different court, a District Court Judge does not have the unilateral power, authority and discretion to direct and reassign an independent action for relief to his chambers for adjudication absent an official order of the court and without official notice to the litigants.

III.

Certiorari should be granted to settle and resolve the conflicts in opinion on whether or not the doctrine of Res Judicata effectively bars, sua sponte, further pursuit of a civil rights claim under the savings clause of Rule 60 (B), wherein a Summary Judgment order was allegedly secured by the improper conduct of the moving party.

The doctrine of res judicata or claim preclusion is only triggered when a second suit is brought for the same claim as a prior suit. In the instant case the principles of res judicata would not operate to bar, sua sponte, this independent action for relief from a judgment which involves separate

and distinct issues (i.e.fraud, misrepresentation etc.) raised by the conduct and action of separate and distinct parties not in privity to each other; or over issues which could not have been previously raised and litigated in the prior suit. See generally, McDonald v. City of West Branch, 466 U.S. 284 (1984).

The United States Supreme Court has consistently held that the doctrine of res judicata is not applicable when the party against whom it is asserted does not have a " full and fair opportunity" to previously litigate the issue or claim. See, Allen v. McCurry, 449 U.S. 90 (1980).

The District Court and Court of Appeals departed far from the accepted and usual course of judicial proceedings in holding that the doctrine of Res Judicata effectively bars an independent claim for relief from a judgment - sua sponte. In the case at bar, the issues of fraud, misrepresentation and excusable neglect in granting a summary judgment order were clearly not a part of the claim or issues raised and/or could have been reasonably raised in the prior suit referred to as "Dickey I". The complaint in "Dickey II" to vacate the summary judgment order of "Dickey I" involved complete and separate issues for relief from judgment before the court than the initial section 1983 Civil Rights Complaint. Accordingly, the District Court could not have summarily dismissed the independent action for relief from judgment under the doctrine of res judicata without allowing for a hearing, and prior to the formulation of the material issues and presentation of the evidence regarding the salient facts. See, Cresswell v. Sullivan and Cromwell, 922 F.2d 60 (2nd Cir. 1990).

It is a well established precedent of Federal law in other circuits that the doctrine of finality does not preclude the district court from setting aside its prior orders under certain circumstances. See generally, In Re Intermagnatics

America, Inc., 926 F.2d 912 (9th Cir. 1991). Since a party may bring an independent action to vacate a court's prior ruling which may have resulted from conduct that prevented the judicial machinery from performing in its usual manner of impartial adjudicating cases, the immediate application of the Doctrine of Res Judicata should not be available, sua sponte, to a former judge to rescue the offending party prior to the presentation of the evidence to the court. See generally, In Re Intermagnatics America Inc., 926 F.2d 912 (9th Cir. 1991); and Robinson v. Volkswagenwerk AG, 56 F. 3d 1268 (10th Cir. 1995).

The District Court's conduct and Court of Appeals ruling are not only violative of the petitioner's right of due process and fair access to the courts, but conflicts with the decisions of this Court on an important Federal provision utilized to safeguard the integrity of the Federal Courts. Lilijeberg v. Health Services Acquisition Corp. 486 U.S. 847 (1988). This conflict in opinion has departed so far from the usual and accept course of judicial proceedings that this Supreme Court is called upon to exercise its supervisory power to correct and settle the question of whether or not the Doctrine of Res Judicata effectively bars, without a hearing on the merits in an independent action for relief, any further pursuit against a Summary Judgment order in a "1983" civil rights action secured under the allegations of improper conduct by the moving party and/or excusable neglect.

The petitioner would argue on appeal, inter alia, that the sua sponte application of the Doctrine of Res Judicata without a hearing on the merits in an independent action for relief based on separate and distinct issues is so erroneous and egregious that it violates the petitioner's right of due process, and to fair and impartial access to the Federal Courts.

IV.

Certiorari should be granted to settle and resolve the conflict in opinion on whether or not a District Court Judge may proceed to rule on matters and motions pending before the court in light of a timely motion for his recusal wherein his pervasive bias and judicial misconduct is properly alleged and supported by affidavits.

Whenever a party to a proceeding in the District Court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings. See, 28 U.S.C.A. Section 144; and Lilijeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

In the case at bar, the petitioner did not receive notice that his independent action had been directed to the prior District Court Judge until an order of dismissal was sent. The petitioner immediately responded to this order with a Motion to Alter and Set Aside Judgment, followed by a Motion and Affidavit for disqualification and recusal of the District Court Judge. The Petitioner, at the first opportunity, moved for recusal and disqualifcation of this presiding Judge for demonstrating a personal interest and pervasive bias in the outcome of the action.

The trial Judge engaged in conduct that departed from the accepted and usual course of judicial proceedings when without notice to the petitioner, he directed that the petitioner's independent action be removed from the docket of another Judge without an official order of the court. This amounted to an abuse of judicial power in violation of the

petitioner's right of due process.

The trial judge's conduct departed far from the accepted and usual course of judicial proceedings by continuing to proceed to review and adjudicate the matters in this action in such a manner of pervasive bias so as to moot the issue of his judicial bias and disqualification. This conduct in essence rendered the petitioner's independent cause of action and motion for disqualification ineffective for purposes of securing a fair and impartial hearings on the merits of the case without further delay, cost and expense. See, In Re Murchison, 349 U.S. 133 (1955).

This Court has consistently held that the administration of justice should always reasonably appear to be disinterested as well as be so in fact. Id at 136. This Supreme Court is called upon to exercise its plenary and supervisory power to correct the far departure from the accepted and usual course of judicial conduct and proceedings such that the fair and impartial administration of justice in accordance with federal law and with the Judicial Improvement Act of 1990 is realized and taken seriously by all federal court officials. This review is necessary to ensure the existence of a fair and impartial tribunal to serve as guardian of a litigant's basic constitutional rights of due process.

V.

Certiorari should be granted to resolve an important issue and question in federal law which should be settled by this court of whether or not a non-moving party is prohibited from offering testimony as evidence in a Summary Judgment proceeding, to supplement the record and defeat a claim of a frivolous action meriting the award of attorney fees.

The specific purpose of a summary judgment hearing is to make a determination of whether or not there exist genuine issues of material facts for a jury to decide and if not whether the moving party is entitled to judgment as a matter of law. Summerlin v. Edgar, 809 F.2d 1034 (4th Cir. 1987).

In the case at bar, the petitioner appeared at a roster meeting for the trial of his case and was given actual notice for the first time that he was scheduled for a summary judgment motion hearing at the end of the roster meeting. While the petitioner urged the court for a continuance, the court refused and therein proceeded to conduct the summary judgment hearing. During the presentation of argument the petitioner pro se offered to be placed under oath and to offer testimony of the disputed facts of the case. The District Court ignored this request and therein refused to accept the petitioner's proffer of evidence to demonstrate genuine issues of material facts. The District Court thereafter concluded that the plaintiff's claim of civil rights violations were groundless and frivolous based upon the failure to produce a single piece of evidence.

This conduct was contrary to the procedural standard for Summary Judgment determinations. See, U.S. Development Corp. v. Peoples Federal Sav' & Loan Ass'n, 873 F.2d 731 (4th Cir. 1989). Rule 56, F.R.C.P. does not and should not preclude the proffer of evidence by testimony at a summary judgment hearing in lieu of a last minute notice of the hearing and reference to deposition testimony by the same deponent in cases involving important constitutional and public issues. See, Board of Education Island Trees Union Free School Dis. No. 26 v. Pico, 457 U.S. 853 (1982); Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir. 1991).

The defendants as moving party relied upon the deposition testimony of the petitioner in support of their summary judgment arguments, but either withdrew the depo-

sition documents from the court files and/or misled the court and petitioner as to the filing of the depositions. It is well established law that once a portion of a transcript and deposition has been introduced into evidence by one party to support their claim, the court may not preclude the introduction of the entire transcript and deposition or any other portion thereof which supports the claim of the adverse party. U.S. v. U.S. Gypsum Co., 340 U.S. 76 (1950).

The District Court and Court of Appeals failed to address the material issue on appeal as to whether or not a non-moving party is prohibited from offering testimony under oath in lieu of his deposition to verify the pleadings and introduce evidence in a summary judgment hearing to defeat the claim of a frivolous action warranting the grant of attorney fees. The District Court could not ignore this proffer of evidence by the plaintiff and thereafter award the defendants cost and attorney fees by concluding said action was groundless when the court only permitted one party to utilize a portion of a deposition to support its claim, but denied the adverse party the right to utilize the same deposition evidence to establish a genuine issue of material facts for a valid legal claim.

The stringent prerequisites for a finding of a frivolous claim were not met and the flagrant violation of the Federal rules of Civil procedure in effect violated the petitioner's right to fully present his case, and to receive procedural due process and equal protection under the law.

Accordingly, any orders flowing therefrom should have been set aside and declared void by the Fourth Circuit. The petitioner must be allowed to correct and/or supplement the record of the case wherein certain official District Court documents were either misfiled, withdrawn or intentionally left out of the court records by the custodians of the records.

The opinions and circumstances surrounding the

issuance of the District Court's orders of summary judgment and attorney fees departed so far from the accepted and usual course of judicial proceedings that this Supreme Court is called upon to exercise its supervisory powers to correct this grave miscarriage of justice in equity and law, to preserve the integrity of the federal judicial process, and to weed out the unauthorized conduct of Federal Court officials otherwise shielded by the cloak of qualified and/or judicial immunity; and not subject to further appellate review.

The petitioner would argue on appeal, inter alia, that to declare a claim frivolous and baseless, the party litigant must first be given a fair and impartial opportunity to present his evidence to the court. Trial by ambush in violation of the Federal Rules of Court should never be tolerated by this Supreme Court.

VI.

Certiorari should be granted because the circumstance surrounding the District Court's procedure of granting Summary Judgment and attorney fees, and the failure of the District court to review all the evidence represented as filed and/or proferred to the court departs so far from the accepted and usual course of judicial Summary Judgment proceedings that the United States Supreme Court must exercise its plenary and supervisory power to address the clear irregularity and affront to justice.

The United States Supreme Court and Court of Appeals throughout the judicial system have made it clear that Summary Judgement cannot be granted in certain complicated civil rights cases unless there is clearly no genuine issue as to any material fact and the moving party is

entitled to judgment as a matter of law. See, Board of Education Island Trees Union Free School Dis. No. 26 v. Pico, 457 U.S. 853 (1982).

The salient issue in this case is whether the District Court, in light of the surrounding circumstances regarding reassignment of petitioner's case without official court order and pending motion against reassignment, may in a Summary Judgment proceeding refuse to consider all the evidence on file (e.g. disposition testimony and offer of testimony under oath of a Pro se litigant) in rendering a decision of a frivolous lawsuit and concluding that there are no genuine issues of material facts to preclude Summary Judgment against the non-moving party. See, Smith v. Virginia CommonWealth University, 84 F.3d 672 (4th Cir. 1996).

The Defendants in their motion for Summary Judgment, represented that they filed with the court the entire depositions of the petitioner and another key witness to support their argument for Summary Judgment. The Defendants then argued points from these depositions either without filing or withdrawing these official documents from the District Court records.

The Court must consider all evidence available to it in a Summary Judgment proceeding (pleading, depositions, and affidavits etc.) when ruling on the existence of material issues of fact before determining that a lawsuit is groundless thereby warranting the grant of attorney fees under 42 U.S.C. sec. 1988. It is a clear violation of procedural due process and the expected rights of a litigant to have his case interrupt -ed by a reassignment of the matter to an individual justice with no prior judge experience at the federal level and then have the District Court Judge utilize substantially all of the petitioner's allotted time to conduct his own cross-examination to become familiar with the case. This judicial

conduct is highly improper in a Summary Judgment proceeding and is such a far departure from the accepted and usual course of judicial proceedings in a Summary Judgment hearing that the District Court invariably engaged in its own fact findings and discovery mission, contrary to laws regarding Summary Judgment proceedings and the constitutional rights of the litigant. See, In Re Atlas Concrete Pipe, Inc., 668 F.2d 905 (6th Cir. 1982); Sankovich v. Life Ins. Co. of N. Am., 638 F.2d 136 (9th Cir. 1981).

A careful review of the record in this case will reveal that Summary Judgment could not result where Defendants failed to timely file its Motion for Summary Judgment, and fail to produce salient discovery documents as requested. See, Snook v. Trust Co. of Georgia Bank, 859 F.2d 865 (11th Cir. 1988). The District Court Judge was without jurisdiction to hear the motion and thereby any Summary Judgment order and order of attorney fees was subject to attack by an independent claim for relief.

The U.S. Supreme Court is now called upon to prevent this miscarriage of justice and protect the integrity of the federal judicial process. This Court should not allow such court proceedings to go unnoticed where depositions and documents were withdrawn from the evidence and court records which support the petitioner's claim of genuine issues of material facts and denies the court's conclusion that the "1983" Civil Rights action is frivolous.

The Supreme Court should exercise its plenary powers to review the procedures below and correct the erroneous course of conduct of the District Court and the errors of review in the Fourth Circuit to ensure uniform conduct by Federal Court officials in regards to summary judgment proceedings, and independent claims for relief.

VII.

Certiorari should be granted to resolve the conflict between the publish opinions and the unpublished opinion of the Fourth Circuit Court of Appeals regarding the required guidelines for requesting and granting attorney fees and cost pursuant to 42 U. S. C. Section 1988.

42 U.S.C. Section 1988 provides stringent guidelines for the grant of attorney fees and cost under a 42 U.S.C. Section 1983 civil rights action. Whenever the local rules of court for a specific circuit enlarges the guidelines as set forth under 42 U.S.C. Section 1988, it is incumbent upon the court to follow the pronounced guidelines it has set forth.

The Fourth Circuit specifically identified the factors set forth in Barber v. Kimbrell's Inc., 577 F.2d 216 (4th Cir. 1978) as the guidelines for requesting and granting attorney fees and cost in this circuit. There is a compelling requirement for a writ of review in the case at bar since the evidence on file of the defendants motion for attorney fees clearly demonstrates that the defendants failed to comply with the required guidelines of this circuit as a matter of law.

The District Court and United States Court of Appeals fails to address the issue of compliance in its unpublished opinion in direct contradiction and conflict with the published opinions of the same circuit.

This Court is called upon to exercise its supervisory powers to correct and call to the attention of the lower courts this substantial departure from the accepted and usual course of judicial proceeding to ensure the uniform ruling of the Fourth Circuit on the guidelines and requirements it has set for the granting of attorney fees and cost in a civil rights action under 42 U.S.C. Section 1988.

The court of Appeals should be required to maintain an Uniform Ruling by the Courts on the required guidelines for attorney fees until the Court officially establishes alternative guidelines for the party litigants to follow.

VIII.

Certiorari should be granted to prevent and prohibit the systematic violation of the procedural due process and the equal protection clause by Federal Court officials.

There still exists a systematic pattern of racial divide in this country which does not exempt Court officials and personnel from the insidious process of aiding and abetting in the economic disparity and racial discrimination in this country. Small business continue to be the main stay of this country's economic viability wherein communities and groups of people are able to shake off the vestiges of past discrimination and make sweeping changes and economic development in their lot for the next generation.

These developments are continually threatened by certain individuals entrusted with the fair and impartial administration of justice, who nevertheless find loopholes in our Court system to assist in the continuation of racial divide. These loopholes must be eliminated to shut down the systematic violation of the procedural due process and unequal administration of justice by those who in their official capacity choose to manipulate wrongfully the judicial process.

In the case at bar, the petitioner has been required to continually confront the institutionalized discrimination of local government and court officials in rural communities who simply act out their prejudices through their public of-

fice. There are still individuals who have the utmost contempt for civil rights law, and their total dis gard for the laws against racial discrimination includes the laws regarding procedural due process and equal protection by even the more responsible citizens and officials of the court.

Corrupt government officials continue to exist and engage in economic terrorism to subjugate a race of people and exacerbate the social, racial and economic divide in this country. This means that our Federal Courts must look closely at enforcing the rules and procedures of the Court which guarantees fair and equal access to the Court by all citizens of these United States.

This Court is now called upon to review the conduct of various court officials vested with the public trust and employed to be guardians of our constitution and judiciary. To this end the United States Court of Appeals for the Fourth Circuit failed to respond to the very issues placed before the Court via an unpublished opinion which never addresses the issues of the timeliness of the Motion for Summary Judgment, and whether or not deposition testimony purportedly submitted to the court by the Defendants for consideration were improperly withdrawn.

If the Fourth Circuit had considered these proper issues, the District Court would be hard-pressed to establish a sound legal basis for granting Summary Judgment and attorney fees to the Defendants under the facts and circumstances of the case.

This matter should be of special concern to this Supreme Court's view of public confidence in the Courts and laws we purport to defend. It is highly unusual to have a case transferred to a less experienced Judge who permits the more popular defendants to file without leave dispositive motions contrary to the standing order of the assigned senior Judge who is still active on the bench. It is also a far departure from

the accepted and usual course of judicial proceedings to have a Judge direct a specific case to his chambers for adjudication outside the normal course of judicial conduct and thereby circumvent a hearing on the merits notwithstanding the relevant Federal Rules of Court.

This Supreme Court is now called upon to consider this petition for certiorari which appears to be one of first instance to this court that is in need of resolution to guide the District Court's practice of reassignment of cases after litigation has commenced once a Judge assumes senior status, to safeguard the constitutional guarantees of due process and equal protection for the fair and impartial administration of justice.

CONCLUSION

The United States Supreme Court is called upon to resolve a conflict in law and principle regarding the proper standard for applying the doctrine of Res Judicata under a Civil Rights action to an independent claim for relief of the order of summary judgment under Rule 60 (B), F.R.C.P.; and to correct the complete failure of the Fourth Circuit Court of Appeals to enforce the guidelines set forth in its own published opinion for granting attorney fees under 42 U.S.C. sec. 1988.

The allegations in this action are extremely significant to the very fabric of this country's economic and racial divide. And therefor the alleged misconduct of local government officials should not be viewed lightly or permitted to be swept under the carpet via an unpublished opinion on the doctrine of res judicata, under a set of compelling facts and procedures in direct conflict with the laws and published opinions of other Federal Courts.

Whether or not Summary Judgment adjudication is proper under the circumstances where the destruction of records and documents by the moving party are at issue should not be determined by a one prong test for Summary Judgement as suggested by the respondents in their motion for Summary Judgment.

The District Court of South Carolina should not be allowed to rule, sua sponte, in an independent claim for relief under the Doctrine of Res Judicata, that the petitioner prior action was completely without merit and therefore his complaint to vacate the summary judgment order is also without merit, unless the pervasive bias of the Judge is removed and the petitioner is given a reasonable and fair opportunity to be heard.

The District Court could not look merely at the uncorroborated affidavits of the respondents and their cohorts, and determine that no genuine issues of any material facts exist and that the respondents are entitled to judgment as a matter of law; and then continue this reasoning into an independent claim for relief while official deposition testimony of key witnesses are precluded from the courts records.

These arguments and the far departure from the ordinary course of judicial proceedings is so acute that it would allow any unethical proponent of evidence law to argue to the court (if the opinions of this case were published) that the uncorroborated testimony of any co-conspirators is evidence of the truth; notwithstanding the real evidence of the smoking gun which unfortunately cannot give the court an affidavit on its own.

This Supreme Court is called upon to resolve the conflict in law and principle within the different circuits regarding the very essence of the saving clause under 60 (B) of the F.R.C.P., to bring a separate action for relief from an

improper judgment; which is not prohibited by the Doctrine of Res Judicata until the party litigant has had a full and fair opportunity to litigate his claim for relief.

For all the foregoing reasons above, petitioner respectfully prays that a Writ of Certiorari be granted in this proceeding and/or that the District Court vacate its order of Summary Judgment, attorney fees and dismissal of the petitioner's independent claim for relief until the complete record of evidence is officially established and given proper review in accordance with the law.

Respectfully submitted,

/s/ James H. Dickey
James H. Dickey, Esquire
Petitioner – Pro Se

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

James H. Dickey,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
City of Hartsville; Members of the Hartsville City Council; Willie D. Herbert, individually and in his Official capacity as city building Inspector; Business License Inspector, of the City of Hartsville; William F. Burton, Jr., individually and in his official capacity as city manager of the City of Hartsville; Matt Canarrella, individually and as As mayor of the City of Hartsville,	)	No. 97-2434
	)	
Defendants-Appellees.	)	

James H. Dickey,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
City of Hartsville; City Council of North Myrtle Beach, Members of	)	No. 98-1117

the City Council; Willie D. Herbert,)
Individually and in his official)
capacity as City Building Inspector;)
William F. Burton, Jr., Individually)
And in his official capacity as City)
Manager of the City of Hartsville;)
Matt Canarrella, Individually and as)
Mayor of the City of Hartsville;)
Willcox, McLeod, Buyck &)
Williams, PA,)
)
Defendants-Appellees.)

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Patrick Michael Duffy, District Judge.
(CA-93-1117-3-23, CA-97-3037-3-10BD)

Submitted: April 28, 1998
Decided: June 18, 1998

Before WILKINS, HAMILTON, and LUTTIG, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

James H. Dickey, Appellant Pro Se. Mark Wilson Buyck, Jr., Robert Thomas King, WILLCOX, MCLEOD, BUYCK & WILLIAMS, PA, Florence, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

OPINION

PER CURIAM:

James Dickey appeals from district court orders denying his request to reopen his action brought under 42 U.S.C. Section 1983 (1994), and awarding costs and attorney fees to the Appellees. The district court properly dismissed Dickey's action seeking vacatur of the court's prior order granting Defendants summary judgment, as this Court affirmed that order in Dickey v. City of Hartsville, 112 F.3d 508 (4th Cir. 1997) (table), which effectively bars any further pursuit of that action under the res judicata doctrine. See *Allen v. McCurry*, 449 U. S. 90, 94 (1980). It follows that the district court was also unauthorized to grant Dickey relief on any of his post-judgment motions relating to the dismissed action. Accordingly, we affirm the order appealed from in case number 98-1117.

In appeal number 97-2434, Dickey challenges the district court's order granting costs and attorney fees in the amount of $10,000 to Defendants pursuant to 42 U.S.C. Section 1988 (1994). An award of costs is proper under that statute if the action was frivolous, unreasonable, or groundless, or if the Plaintiff continued to litigate it after it clearly became so. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). In this case, the court granted summary judgment after Dickey failed to produce a single piece of evidence supporting his claims of discrimination despite being afforded discovery for three years and liberal access to the Defendants' records.

Accordingly, the district court's order awarding fees and costs is also affirmed. Dickey's motion to correct and/or supplement the record is denied. We dispense with oral argument because the facts and legal contentions are ade-

quately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 20, 1998

No. 97-2434
CA-93-1117-3-23

JAMES H. DICKEY

Plaintiff - Appellant

v.

CITY OF HARTSVILLE; MEMBERS OF THE HARTSVILLE CITY COUNCIL; WILLIE D. HERBERT, individually and in his official capacity as city building inspector; BUSINESS LICENSE INSPECTOR, of the City of Harstville; WILLIAM F. BURTON, JR., individually and in his official capacity as city manager of the City of Hartsville; MATT CANARRELLA, individually and as mayor of the City of Hartsville

Defendants - Appellees

No. 98-1117
CA-97-3037-3-10BD

JAMES H. DICKEY

Plaintiff- Appellant

v.

CITY OF HARTSVILLE; CITY COUNCIL OF NORTH MYRTLE BEACH, Members of the City Council; WILLIE D. HERBERT, individually and in his official capacity as City Building Inspector; WILLIAM F. BRUTON, JR., Individually and in his official capacity as City Manager of the City of Hartsville; MATT CANARRELLA, Individually and as Mayor of the City of Hartsville; WILLCOX, MCLEOD, BUYCK & WILLIAMS, PA

Defendants – Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

_____

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JAMES H. DICKEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. #3:97-3037-23
	)	
CITY OF HARTSVILLE et. al.,	)	ORDER
	)	
Defendant.	)	

This matter is before the court upon defendants' motion to dismiss or, in the alternative, transfer venue. Defendants assert that the case should be dismissed for improper venue under Fed. R. Civ. P. 12(b) (3). The court does not find that dismissal is warranted under Fed. R. Civ. P. 12 (b) (3), but the court nonetheless finds that the action should be dismissed for the reasons set forth below.

I. ANALYSIS

This is not the first time that plaintiff has appeared before this court. Mr. Dickey was the plaintiff in Civil Action No. 3:93-1117-23 ("Dickey I"). On March 29, 1996, this court granted the defendants' motion for summary judgment in Dickey I which was subsequently "affirm[ed] on the reasoning of the district court" by the Fourth Circuit. See Dickey v. City of Hartsville, 1997 WL 218852, *1 (4th Cir. (S.C.)).In the present case, plaintiff's complaint is captioned

"Complaint to Vacate Order of Summary Judgment." Plaintiff is seeking to have the court vacate its April 1, 1996 Order granting defendants' motion for summary judgement and its September 12, 1997 Order awarding defendants $10,000 in attorneys' fees. This court is not going to reconsider its previous orders, especially since the court previously denied motions to reconsider both orders in Dickey I.

The parties in Dickey I and the case at bar are exactly the same except that the law firm who represented the defendants in the previous action, Willcox, McLeod, Buyck and Williams, P.A., is an additional defendant in the present case. All of plaintiff's claims arise from the same series of events. The only difference between Dickey I and the case at bar is the manner in which plaintiff's claims are structured. Plaintiff's claims are nothing more than his attempt to relitigate issues adjudicated in Dickey I. This restatement of legal theories does not revive plaintiff's claims which are barred pursuant to the well-established legal doctrine of res judicata:

> A judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy....Not only as to every matter which was offered and received to sustain or defend the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Cromwell v. County of SAC, 94 U. S. 351, 352-53 (1876). Plaintiff had his day in court, and both this court and the Fourth Circuit Court of Appeals have ruled against him. The court must not allow litigation to become a carnival game of "shoot 'til you score."

It is within the discretion of the district court to dismiss a case sua sponte. Crosby v. Holsinger, 816 F. 2d 162, 163 (4th Cir. 1987). "[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U. S. 90, 94 (1980). Accordingly, the present case must be dismissed.

II. CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons that plaintiff's case is **DISMISSED.**

AND IT IS SO ORDERD.

/s/ Patrick M. Duffy
PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
December 17, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JAMES H. DICKEY,	)	
	)	
Plaintiff,	)	C.A. #3:93-1117-23
	)	
vs.	)	
	)	
CITY OF HARTSVILLE, et al.,	)	**ORDER**
	)	
Defendants.	)	

This matter is before the court upon defendants' motion for costs and attorney's fees pursuant to 42 U.S.C. Section 1988.(1)

I. BACKGROUND

This action was commenced in May 1993, by plaintiff, an attorney and member of the bars of South Carolina, Georgia and Texas. In his complaint, plaintiff prays for damages totaling in excess of five hundred million ($500,000,000.00) dollars against defendants. His causes of action were primarily based upon allegations of racial discrimination in

(1) Plaintiff asserts in his response to defendants' motion that the case is presently on appeal. However, the Fourth Circuit has affirmed this court's order granting summary judgment in favor of defendants in an unpublished opinion. See Dickey v. City of Hartsville, 112 F.3d 508 (4th Cir. 1997) (Unpublished).

the enforcement of various ordinances of the City of Hartsville. After three years of formal and informal discovery, defendants moved for summary judgment.

In response, plaintiff submitted no affidavits, filed no discovery responses, and produced no evidence whatsoever in support of his claims. At the hearing on the motion for summary judgment, the court engaged in a lengthy and probing colloquy with plaintiff in a more than reasonable attempt to ascertain whether there existed any evidence in support of his allegations. That colloquy simply confirmed that there was no such evidence. Consequently, defendants' motion for summary judgment was granted.

II. ANALYSIS

In order to prevail on their request for fees and costs in this action pursuant 42 U.S.C. Section 1988, defendants must show that the plaintiff's claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so" Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); Hughes v. Rowe, 449 U.S. 5, 14 (1980). In determining whether the plaintiff's claim was frivolous, unreasonable, or groundless, subjective intent is not to be considered. Christianburg, 449 U.S. at 421. The relevant inquiry is whether the claims were objectively without basis. Plaintiff's claims in this action were objectively baseless. As an attorney, plaintiff can be presumed to have understood the necessity of producing evidence in support of his claim at the summary judgment stage of the litigation. In spite of having had essentially unfettered access to the records of the City of Hartsville for two years, plaintiff failed to produce a single document in support of his claims.

Defendants have submitted the bills generated as a

result of having to defend this frivolous suit. The court finds that the hourly rates charged and the number of hours expended are reasonable. Given the nature of the dispute and other equitable factors, the court in its discretion awards fees in an amount less than requested.

III. CONCLUSION

It is therefore,

ORDERED, for the foregoing reasons, that defendants' motion for costs and attorney's fees is GRANTED in the amount of ten thousand dollars ($10,000).

AND IT IS SO ORDERED.

/s/ Patrick M. Duffy
PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
September 9, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JAMES H. DICKEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. # 3:93-1117-23
	)	# 3:97-2434-23
	)	
CITY OF HARTSVILLE, et al.,	)	
	)	
Defendants.	)	

This matter is before the court upon plaintiff's motion to supplement the record transmitted to the Fourth Circuit Court of Appeals. The motion is hereby **GRANTED** to the extent that the clerk of court is directed to transmit any documents currently filed with the court as part of the record in C. A. # 3:93-1117-23 to the Fourth Circuit Court of Appeals, if it has not already done so.

AND IT IS SO ORDERED.

/s/ Patrick M. Duffy
PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
December 1, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JAMES H. DICKEY, Plaintiff, v. CITY OF HARTSVILLE, MEMBERS OF THE CITY COUNCIL, WILLIE D. HERBERT, individually and in his official official capacity as City Building Inspector, Business License Inspector of the City of Hartsville WILLIAM F. BURTON [sic,] JR., individually and in his official capacity as City of Hartsville, and MATT CANARELLA, individually and as Mayor of the City of Hartsville, Defendants.	)	C.A.# 3:93-1117-23 ORDER

This matter is presently before the court on Defendants' Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure. Plaintiff filed the

present action alleging: (1) an equal protection claim under 42 U.S.C. § 1983 against the individual Defendants; (2) a municipal liability equal protection claim under 42 U.S.C. § 1983 against the City of Hartsville; (3) a conspiracy claim under 42 U.S.C. § 1985; (4) a claim for intentional infliction of emotional distress; (5) a claim for the intentional interference with contractual relations; and (6) a claim for battery. Having heard oral arguments, this court grants Defendants' Motion for Summary Judgment. Plaintiff is pro se, and pro se complaints are to be liberally construed. Estelle v. Gamble, 429 U.S. 97, 106(1976). However, Plaintiff is a licensed attorney, and, as such, he should be cognizant of what evidence is necessary to create a genuine issue of material fact in this action.

I. BACKGROUND

Plaintiff is an African-American resident of Atlanta, Georgia. Defendants are the City of Hartsville ("the City"), Members of the City Council ("Council'), Willie Herbert, Jr. ("Herbert"), the City Building Inspector, William F. Bruton, Jr. ("Bruton"), the City Manager and Matt Canarella, the former mayor of the City. In 1983, Plaintiff purchased the three lots that are the subject of controversy. There are two buildings situated on these lots. This property is, and has been since 1959, zoned for business purposes only.

Prior to Hurricane Hugo in 1989, a portion of one building was used to store plumbing supplies, and the remaining portion of the building was used as Plaintiff's law

office ("Building One"). Building One spans lots 138 and 139.(1) There is no evidence that Plaintiff ever obtained any business licenses to conduct business in the City. The other building situated on the property was either an automobile garage or a junkyard ("Building Two") (2). Building Two spans lots 138, 139 and 140. Both of the buildings were damaged by Hurricane Hugo. Building One sustained some structural damage, but otherwise was relatively intact. All that remained of Building Two was a concrete floor and structural timber.

In mid-1990, Plaintiff decided to renovate the buildings. He met with Mr. Rufus Streeter ("Streeter"), a local draftsman, and decided to renovate Building One into three separate businesses: a law office, a beauty salon and a liquor store. Subsequently, Plaintiff hired Mr. Tommy Lewis ("Lewis"), a local contractor, who obtained the necessary permits. At some point after Lewis had begun the work, he requested that Defendant Herbert conduct an inspection of Building One. This inspection revealed the need for various structural changes in the building. After further completing construction, Lewis quit work on the project because of Plaintiff's failure to pay him. Eventually, Streeter also stopped work on the project due to a dispute with the Plaintiff. Thereafter, Plaintiff hired various contractors and

---

(1)The significance of the lot numbers is only to illustrate Plaintiff's desire to place more than one building on an individual lot discussed infra.

(2) The use of Building Two is in dispute; however, this has no dispositive effect on the court's decision because Plaintiff's intended use for the building is violative of the City's zoning ordinance for reasons discussed infra.

other builders to perform work on Building One.

Plaintiff approached Mr. Bobby Dempsey ("Dempsey") about landscaping the property and about possible renovations to Building Two. Dempsey provided Plaintiff with a preliminary plan ("the Dempsey Plan"). Plaintiff never hired Dempsey, and no permits were issued. Defendants informed Plaintiff that he would not be able to rebuild Building Two because it would not be in accordance with the City zoning ordinance's prohibition against two principal buildings on one lot. Nonetheless, Plaintiff took the Dempsey Plan and presented it to the City as his landscape plan. The plan was rejected by the City because it failed to comply with the City landscape ordinance.

In 1992, Plaintiff's application to obtain a business license from the City was also refused. Plaintiff took issue with the ordinances as applied to him and his property, as well as, the conduct of the Defendants and subsequently filed this action.

II. STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate when there exists no genuine issue as to any material fact and a decision may be rendered as a matter of law. Fed. R. Civ. P. 56. The party moving for summary judgment has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The facts must be viewed in the light most favorable to the nonmoving party so that any doubt as to the existence of a genuine issue of material fact will be resolved in favor of denying the motion. Adickes, 398 U.S. at 157; United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Neverthe-

less, the motion must be granted if the court is satisfied that no real factual controversy is present, so that the remedy can serve "its salutary purpose in avoiding a useless, expensive, and time consuming trial where there is no genuine, material fact issue to be tried." Lyons v. Board of Educ., 523 F.2d 340, 347 (8th Cir. 1975).

III. DEFENDANTS' ACTS CONCERNING PLAINTIFF'S PROPERTY

Plaintiff alleges that the individual Defendants sought to apply various ordinances and codes of the City against him and his property in a racially discriminatory manner, intentionally denying Plaintiff the opportunity to operate businesses from his property. Plaintiff further alleges that the individual Defendants engaged in intentionally discriminatory tactics to harass Plaintiff's contractors and others working on his property. Plaintiff claims that this conduct violated his right to equal protection under the law.

An equal protection challenge requires a two-step analysis. First, the court must review the challenged law to determine whether it is facially neutral or whether the law actually presents a facial classification. Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995). The City's three ordinances at issue appear to be facially neutral: The landscape ordinance applies to all new developments. The zoning ordinance applies to all areas of the City. The business license ordinance applies to all individuals conducting business.

If a classification is not explicitly stated, the Plaintiff bears the burden of proving that an intentional classification was utilized by the Defendants. Id. at 819. To sustain his burden of proof, the Plaintiff must show more than a benefit being conferred to someone, but denied to him; and more

than a racially disparate impact. Id. (citations omitted). The Plaintiff has to prove that the Defendants intentionally discriminated through the classification in their administrative actions. Id. Despite alleging that the ordinances have been applied in a selectively discriminatory manner, Plaintiff has failed to submit any evidence to the court of this alleged discrimination.

Because the proposed use for the property is different from its preexisting use, Plaintiff is being required to comply with the provisions of the landscape ordinance. Defendants Herbert and Bruton determined that the Dempsey Plan did not comply with the landscape ordinance because it failed to list the landscape materials. Although Plaintiff has failed or refused to submit another plan that complies with the ordinance, he complains that the landscape ordinance has been enforced in a racially discriminate manner.

The zoning ordinance allows for only one principal building on each lot, but it provides an exception for preexisting lawful use prior to 1987, as did the landscaping ordinance. This exception does not include a continued nonconforming use of property which is reestablished after discontinued use for six months or more; or property to be repaired, rebuilt or altered after damage exceeding fifty (50) percent of its replacement cost at the time of destruction. (3) Building Two was not repaired within six months of its destruction and was more than fifty (50) percent destroyed by Hurricane Hugo. Therefore, Plaintiff's continued use of the property must be in compliance with the zoning ordinance. It follows that Plaintiff cannot have more than one building being situated on each lot. Defendants, refusal to allow Plaintiff to reconstruct Building Two, which would

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(3) These are not the only provisions to preclude property from being within the nonconforming use exception.

result in more than one building situated on each lot, was clearly within and pursuant to the zoning ordinance. There is no evidence to support Plaintiff's contention that the zoning ordinance was enforced in a racially discriminatory manner.

The City's business license ordinance requires all business license applicants to pay certain annual fees. The fee is calculated based on two factors: (1) the business' gross income and (2) the classification of the business. A business license will be denied if the applicant fails to comply with all building and zoning codes or if the application is incomplete. Plaintiff's business application was denied because, (a) he failed to state his gross income on the application, opting instead to submit his net income, and, (b) he was not in compliance with certain City codes, namely the landscape ordinance. There is no evidence to support Plaintiff's claim that race was a factor in Defendant' decision to deny his business application.

Plaintiff further alleges that Defendant Herbert and other unnamed city officials withdrew the Plaintiff's building permits as part of a racially motivated plan to harass him. However, the evidence submitted to the court shows that Plaintiff's contractors were granted all the necessary permits to undertake renovations and not a single permit was withdrawn. Plaintiff also claims that Herbert is responsible for other incidents of racial harassment. First, Plaintiff claims that Herbert instructed Lewis to "gut" Plaintiff's building and attempt to extort money from Plaintiff. Secondly, Plaintiff alleges that Herbert drove other workers away from Plaintiff's property through his selective enforcement of various building codes. Plaintiff has not submitted any evidence to the court to support these allegations of harassment.

IV. CIVIL RIGHTS CLAIMS AGAINST THE CITY

A governmental entity cannot be held liable simply because it employs a tortfeasor. Monell v. Dep't of Social Services, 436 U.S. 658, 692-694 (1978). Plaintiff must prove that the City's official policy or custom was the moving force behind the alleged constitutional violation. Id. 436 U.S. at 694. Plaintiff must further establish an affirmative link between the official policy or custom and the alleged constitutional violation. Spell v. McDaniel, 824 F.2d 1380, 1386-87 (4th Cir 1987).

Official municipal policy can be determined through municipal ordinances and regulations, or it may also be shown through formal or informal decisions of municipal officials authorized to make and implement municipal policy. Id. at 1385-86. (citations omitted). Policy in this context implies a course of action chosen from among various alternatives with respect to governmental functions, as opposed to, operational details of government. Id. at 1386. Municipal custom is established by showing persistent and widespread discriminatory practices of municipal officials. Id. at 1387. Plaintiff has not submitted any evidence to show that any policy or custom of the City is racially discriminatory.(4)

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(4) Plaintiff argues that Defendant Herbert is a policy maker for the City. There is no need to address this issue because no discrimination has been shown necessitating such a determination.

V. PLAINTIFF'S SECTION 1985 CONSPIRACY CLAIM

Plaintiff alleges that Herbert conspired with all the white contractors working on his property to deprive Plaintiff of his equal protection rights because the white contractors quit working and removed their building permits. No evidence has been submitted to the court showing any indication of the existence of the alleged "tacit understanding and agreement" between Herbert and the contractors working on Plaintiff's property, referred to in Count II of his Complaint, causing a violation of Plaintiff's civil rights.

VI. PLANTIFF'S STATE LAW CLAIMS

Plaintiff alleges three supplemental state law claims against Herbert and the City: (1) intentional interference with contractual relations; (2) intentional infliction of emotional distress; and (3) battery. The South Carolina Tort Claims Act ("Act") provides the exclusive remedy for the alleged torts of a government employee. S.C. Code Ann. § 15-78-70(a) (Law. Coop. 1995). The Act mandates that any suit for damages brought for the alleged torts must be brought against the governmental entity. S.C. Code Ann. § 15-78-70(c) (Law. Co-op. 1995).

To recover for a claim of intentional infliction of emotional distress under the Act, the Plaintiff must prove: (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community"; (3) the actions of the defendant caused the plaintiff's emotional distress; and

(4) the emotional distress suffered by the plaintiff was so "severe" that "no reasonable man could be expected to endure it."

Wilkes v. Youna, 28 F.3d 1362, 1366 (4th Cir. 1994) (quoting Ford v. Hutson, 276 S.E.2d 776, 778 (S.C. 1981)). Plaintiff has submitted no evidence to satisfy these requirements.

Plaintiff alleges that Herbert enforced the City building codes and other ordinances in an arbitrary, capricious and racially discriminatory manner. Plaintiff asserts that this enforcement, along with other unspecified acts, caused several of Plaintiff's contractors and other workers to breach their contracts with him. The actions of which Plaintiff complains involve Defendants' efforts to enforce the City's codes and ordinances. Defendants are not liable for a loss resulting from enforcing an ordinance or regulation. S.C. Code Ann. § 15-7860 (4) (Law. Co-op. 1995); See also, Wortman v. Spartanburg, 425 S.E.2d 18, 19 (S.C. 1992). Further, to succeed on a claim of intentional interference with contractual relations, Plaintiff must show: (1) a valid contract; (2) Defendants, knowledge of the contract; (3) Defendants' intentional procurement of the breach of the valid contract; (4) absence of justification for the procurement of the breach; and (5) damages resulting therefrom. DeBerry v. McCain, 274 S.E.2d 293, 296 (S.C. 1981). Plaintiff has not submitted evidence to satisfy these requirements. The evidence submitted to the court indicates that the various workers failed to complete their jobs due to Plaintiff's own conduct.

Plaintiff also alleges that Herbert committed battery during a confrontation in Herbert's office. To succeed, Plaintiff must show that Herbert inflicted an unlawful, unauthorized violence on his person. Gathers v. Harris Teeter,

317 S.E.2d 748, 754 (S.C. 1984). The evidence submitted to the court shows that Plaintiff refused to leave Herbert's office which resulted in the confrontation between the two men and that no battery occurred.(5) Plaintiff has failed to submit any evidence to the court to support his battery claim.

Plaintiff has failed to submit to the court any affidavits, verified pleadings or sworn testimony to support any of the allegations set forth in his Complaint.

VII. CONCLUSION

For the foregoing reasons, this court finds no genuine issue as to any material fact. It is therefore,

ORDERED

That Defendants' Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

/s/ Patrick M. Duffy
PATRICK MICHAEL DUFFY
DISTRICT COURT JUDGE

Charleston, South Carolina
March 29th, 1996

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(5) The evidence relied upon by the court is the affidavits of Herbert and his secretary, Sherry Thomas. Plaintiff submitted no evidence to the contrary.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Richmond, Va.

No. 97-2434
No. 98-1117

JAMES H. DICKEY,	*	PETITION FOR
	*	
Appellant/Petitioner	*	REHEARING AND
	*	
vs.	*	SUGGESTION
	*	
CITY OF HARTSVILLE, et. al.	*	THAT REHEARING
	*	
Appellees/Defendants.	*	BE IN BANC
	*	

The above-named petitioner, Plaintiff in Civil Case No. 3:93-1117.OBD(23) and 3:97-3037.10BD, petitions this court for rehearing to reconsider the consolidated judgment entered in this action on June 18, 1998.

INTRODUCTORY STATEMENT AND PURPOSE

Petitioner files this petition and suggestion for rehearing to demonstrate that in his judgment material facts and law were overlooked in the decision, and the unpublished opinion is in conflict with the published opinion and decision of this court and of another court of Appeals, and the conflicts are not addressed in the opinion.

GROUNDS FOR REHEARING

The grounds for rehearing in regards to appeal number 97-2434 are as follows:

I. The per curiam opinion of the Court of Appeals by merely affirming the decision of the District Court regarding Attorney fees does not address the material issue on appeal as to whether or not the non-moving party is prohibited from offering live testimony under oath in lieu of deposition as evidence in a summary judgment proceeding to defeat the claim of a frivolous action.

This court's opinion memorializes that the District Court granted summary judgment after "Dickey" failed to produce a single piece of evidence supporting his claim of discrimination despite being afforded discovery for three years and liberal access to the Defendant's records. However, this court appears to overlook the facts and evidence on file of continual motions to compel and complaints against the defendant for the destruction and removal of documents from the order of files which prevented Plaintiff's liberal access to the defendant's actual records. This court assumes that "Dickey" failed to produce any evidence to support his claim but does not address whether or not the district court may properly prohibit and ignore the offer of live testimony under oath in a summary judgment proceeding as evidence in lieu of the actual transcript of "Dickey's" deposition; and thereafter conclude that plaintiff's action is groundless and/or frivolous based upon the failure to produce evidence.

The District Court could not ignore "Dickey's" proffer of evidence by live testimony at the summary judg-

ment hearing and then preclude the subsequent introduction of the complete deposition by "Dickey" once a portion of the deposition had been submitted by the moving party as evidence in the case. Accordingly, the District Court's award of attorney fees and cost could not be clearly supported by the record on appeal without a determination of whether or not it was proper to preclude the proffered evidence, inter alia, of the appellant.

Further, The Federal Court of Appeals have consistently held that once a portion of a transcript deposition has been introduced as evidence by one party to support their claim, the court may not preclude the introduction of the entire transcript and deposition or any other portion thereof which supports the claim of the adverse party. U. S. v. U.S. Gypsum Co., 340 U.S. 76 (1950).

Thus by analysis, the unpublished opinion in this case is in conflict with other published opinions of the court in this and other circuits.

II. The per curiam opinion does not address the issue on appeal of whether or not there was proper compliance with the required guidelines by the Appellees and a proper finding that the appellant's claim was frivolous and objectively baseless under the circumstances to merit the award of attorney fees and cost pursuant to 42 U.S.C. sec. 1988.

The Court of Appeals appear to overlook the Appellee's duty to comply with the law and procedural requirements for granting attorney's fees and cost pursuant to 42 U.S.C. sec. 1988; and the local rules of the 4th circuit regarding attention to the equitable factors as cited in Barber v. Kimbrell, Inc., 577 F.2d 216 (1978).

This court upon review of the record appear to overlook the issue of whether or not the District Court was required to make a reasonable inquiry into the equitable factors as cited in Barber v. Kimbrell Inc., in exercising the district court's discretion in awarding cost and attorney fees to Appellees under the circumstances. The law of the 4th circuit clearly set forth the required guidelines for granting attorney fees and cost in the case at bar, however the record and unpublished opinion in this case is void of any such reference to appellee's compliance with the required guidelines.

The Appellant submitted that the Appellee's and the district court failed to address the requirements set forth in Barber v. Kimbrell Inc. and that throughout argument against summary judgment, the continual reference to the complete deposition on file with the court would have defeated any actual finding that this action was frivolous and/or objectively baseless.

Accordingly, the court of appeals fails to address these material issues of fact and law under the current unpublished opinion and it thereby conflicts with other published opinions of this court.

SUGGESTION FOR REHEARING IN BANC

The following are additional grounds for rehearing and for the Suggestion that Rehearing be in Banc.

III. The full court of appeals should give consideration to this proceeding because the per curiam opinion of the court is in conflict with the published opinions of other courts and fails to properly consider the law of the 4th circuit and the record on appeal in regards to the guidelines for granting attorney fees and cost.

The federal court and court of appeals in this and other circuits have required strict compliance with the statutory guidelines for awarding attorney fees and cost under 42 U.S.C. sec. 1988.

The District Court of South Carolina and the United States Court of Appeals for the Fourth Circuit require that the petition for attorney fees strictly comply with the requirements set forth in Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978), and shall state any exceptional circumstances and the ability of the party to pay the fee before the award of attorney fees and cost. The Court of Appeals failed to address the material issue of whether or not the defendants complied with the guidelines regarding the award of attorney fees; and the current court of appeals panel appears to overlook the law and record on appeal applicable to this issue as set forth in Barber v. Kimbrell, Inc.

The newly appointed Judge could not have legally had any special knowledge of the efforts expended and the value of the service rendered by the attorneys for the Defendants in this case to concluded "sua sponte" the appropriateness of the grant of attorney fees and cost without first having the proper evidence regarding these issues submitted to the court for consideration.

The District Court failed to properly consider the required factors as set forth in Barber v. Kimbrelll, Inc., and this court appears to overlook the same required factors necessary to determine whether or not the District Court committed error and abused its discretion in the award of attorney fees and cost to the Appellees under the circumstances.

GROUNDS FOR REHEARING

The grounds for rehearing in regards to appeal number 98-1117 are as follows:

IV. The per curiam opinion of the court appears to overlook the material facts and law regarding relief from judgment secured by fraud, misrepresentation, and excusable neglect and does not address the material issue on appeal of whether or not the District Court committed error and abused its discretion in transforming the Appellant's independent action for relief into a motion for reconsideration.

This court appears to overlook the right of the Appellant to present evidence to the court regarding the material facts of his complaint and thereby enlightened the court on the proper law applicable to his case. This Court of Appeals opinion appears to allow the District Court to either assume as a matter of law that the Plaintiff's allegations are false, sua sponte, or prejudge the evidence prior to its presentation to the court.

This conduct is clearly contrary to the opinion in other circuits and to the Federal Laws and Rules of court procedure regarding Independent Actions. (See generally, Federal Rules of Court). The dismissal the appellant's action, sua sponte, without giving the Appellant an opportunity to be heard is a clear violation of the Appellant's' Constitutional rights to procedural Due Process and is contrary to the stated law and saving clause regarding relief from judgments by an independent action under Rule 60. This Court of Appeals opinion appear to overlook these issues of material fact and law in its unpublished per curiam opinion, and this court thereby failed to resolve the material issues before the court

in this case.

V. The per curiam opinion of the court is in conflict with other decisions of the court of appeals regarding the doctrine and application of res judicata and these conflicts are not addressed in this unpublished per curiam opinion.

The legal principle of res judicata are not applicable in cases where separated and distinct issues (i.e. fraud, misrepresentation) are raised by the conduct and action of separate and distinct parties not in privy to each other; over issues which could not have been previously raised and litigated in the prior suit.

The Court of Appeals in other published opinions have consistently held that while a final judgment on the merits precludes a party from relitigating the same issues that were or could have been reasonably raised in a prior action, the doctrine of res judicata is not applicable when the party against whom it is asserted does not have a "full and fair opportunity" to previously litigate the issue or claim. See, Allen v. McCurry, 449 U. S. 90 (1980).

Under the current case, the issues of fraud, misrepresentation and excusable neglect in the granting of summary judgment order were not a part of the issues raised and/or could have been reasonably raised in the case referred to as "Dickey I". The complaint in "Dickey II" to vacate the summary judgment order of "Dickey I" involved complete and separate issues for relief from judgment before the court than the initial "sec. 1983 complaint" of discrimination.

According to the law and reasoning of other published opinions of the Appellate Courts, this case should not have been summarily dismissed under the doctrine of Res Judicata prior to the formulation of the material issues

and presentation of evidence regarding the material facts to allow the case to become ripe for adjudication. Cresswell v. Sullivan and Cromwell, 922 F.2d 60 (2nd Cir. 1990). This court of Appeals appears to overlook this conflict and/or fails to address the conflict in the unpublished per curiam opinion of this case.

SUGGESTION FOR REHEARING IN BANC

The following are additional grounds for rehearing and for the Suggestion that Rehearing be in Banc:

VI. The Full Court of Appeal should review and give consideration to this proceeding because the per curiam opinion is in conflict with the publised opinions of other courts and the opinion affirms conduct by the District Court that has far departed from the accepted and usual course of judicial proceedings.

The Federal courts published opinions have consistently held that an independent action may be had in equity to relieve a party of a judgment that may be manifestly unconscionable and/or obtained by misconduct of the officers of the court. Demjanjak v. Petrovsky 10 F.3d 338 (6th Cir. 1993); Hadger v. Yonkers Racing Corp. 48 F.3d 1320 (2nd Cir. 1985); Transaero Inc. v. LaFuerza Area Boliviana 24 F.3d 457 (2nd Cir. 1994). And Rule 60 B (F.R.C.P.) specifically states that it does not limit the power of the court to entertain an independent action to relieve a party from a judgment or order rendered under certain circumstances.

This Court of Appeals opinion appears to overlook the District Court Judge's conduct of removing this independent action from the docket of another Judge without

a proper order of the court and without official notice to the litigants and therein proceed, sua sponte, to transform the action into a Rule 60 (B) motion for his reconsideration and dismissal. No Judge should be allowed to specifically direct a particular case to his chambers for adjudication without an official order of the court and outside the Rules regarding the random assignment of cases without notice to the litigants. The District Court Judge departed far from the usual course of Judicial proceedings and abused his discretion in engaging in conduct to preclude the introduction and development of evidence which would support the Appellant's independent claim for relief under the current action. This was a clear violation of the guidelines for procedural due process and the Full Court of Appeals should give careful attention to this matter.

VII. The Full Court of Appeals should review and give consideration to this proceeding because it involves issues of exceptional importance and direction for the District Court, and is necessary to establish and maintain an uniform ruling by the court regarding the issues at hand and of the savings clause under Rule 60 B.

The per curiam opinion appear to overlook and fail to decide an important question of Federal Law, Rules and Procedure which needs to be settled in this circuit. The savings clause of Rule 60(b) F.R.C.P. permit a party to bring an independent action for relief from a judgment in either the same court or a different court if the jurisdictional requirement are met. See generally, Cresswell v. Sullivan and Cromwell, 922 F.2nd 60 (2nd Cir. 1990).

The per curiam opinion does not address the issue of exceptional importance of whether or not the District Court Judge of the underlying case have the unilateral power and

authority to direct and reassign an independent action for relief to his chambers for adjudication absent an official order of the court and without official notice to the litigants. It is well established that the doctrine of finality does not preclude the District Court from setting aside its prior orders. See generally, In re. Intermagnetics America Inc. 926 F.2d 912 (9th Cir. 1991).

The Judicial Improvement Act of 1990, 28 U.S.C.A. sec. 471-482, provides for a fair and impartial administration of justice to insure a just, speedy and inexpensive determination of an action on the merits. The conduct of the South Carolina District Court appear to violate this affirmative duty by engaging in procedures and measures that far departs from the usual course of Judicial proceedings in fairness and equity. The substantive issue underlying this entire proceedings is whether or not there is evidence of any genuine issues of material facts for the court to decide. Since the disputed last minute reassignment of the Appellant's case to another Judge under "Dickey I" and the out of time filing of defendants motion for summary judgment, the District Court of South Carolina has unwarily assisted the defendants in precluding the Plaintiff's evidence of his case and claim.

Rule 1, F.R.C.P. requires that the district court take a liberal approach in determining whether a genuine dispute exist which should proceed and be resolved on the merits. Coon v.Grenier, 867 F. 2d 73 (1st Cir. 1989). The District Court's procedures and conduct in this proceeding appear to actually suppress official evidence of the case (e.g. Depositions) and thereby render the Appellant's underlying claim frivolous. This Court of Appeals is obligated to consider and review any procedures which are inconsistent with the usual course of Judicial proceedings which may have denied this litigant a meaningful opportunity to partici-

pate in the litigation process. Since a party may bring an independent action to vacate a court's prior ruling which may have resulted from conduct that prevented the Judicial machinery from performing in its usual manner of impartial adjudicating cases, the immediate application of the doctrine of res judicata is not available, sua sponte, to the former Judge to rescue the offending party prior to the presentation of the evidence to the court. In re. Intermagnatics America Inc. 926 F.2d 912 (9th Cir. 91).

It is hereby necessary for the Full Court of Appeals to establish and maintain a uniform ruling in this circuit regarding the substance, effect, and purpose of the saving clause under Rule 60(b) which allows for an independent action to obtain relief from Judgment notwithstanding the doctrine of res judicata.

CONCLUSION

Therefore, for the reasons above stated, the petitioner respectfully request a rehearing and reconsideration in Banc of the per curiam opinion affirming the decision of the District Court in Appeal number 97-2434 and 98-1117 respectively in this case.

Respectfully submitted,

/s/ James H. Dickey
James H. Dickey

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

98-1117 Dickey v. City of Hartsville
CA-97-3037-3-1OBD

INFORMAL BRIEF

Jurisdiction:

Appellant appeals this case from the United States District Court of South Carolina-Columbia Division. The order of dismissal was entered on December 19, 1997 and denial of the motion to alter and set aside judgment was entered on January 21, 1998. These orders were timely appealed and docketed on January 27, 1998.

Brief Statement of Facts:

This action was commenced on October 3,1997 by the Appellant in an independent action for relief from a Summary Judgment order alleged to have been secured by the Defendants and the Defendants' Law Firm by fraud and misrepresentation of the evidence on file with the District Court, and excusable neglect, inter alia. The District Court Judge who issued the Summary Judgment order, within twenty-four hours of the Defendants' Law Firm acknowledgment of receipt of the summons and complaint, directed that the case be removed from the docket of another Judge and ostensibly directed to him.

The Defendants, thereafter filed an answer to the complaint to vacate the order of Summary Judgment, and a Motion to Dismiss or in the alternative transfer venue based

on the argument that venue was not proper. The court ruled that dismissal was not warranted for improper venue, and nonetheless immediately dismissed the complaint, sua sponte, under the theory of res judicata.

Issues on Appeal:

Issue 1: Did the District Court Judge commit error and abuse his discretion in directing this independent action for relief from judgment to his docket for adjudication without order of the court?

Answer: Yes. An independent action for relief from a prior judgment need not be commenced or assigned to the same Judge and Court for adjudication and to obtain the relief requested. It was contrary to equity, law, and the court rules regarding the random assignment of cases for a District Court Judge to direct that a specific matter be assigned to his docket after the case has been docketed before another Judge, and to proceed with his own review of the case outside the normal procedural channels for adjudicating matters in the District Court, without the power and authority of a valid court order.

In the case at bar, the Honorable Patrick M. Duffy demonstrated a particular interest in the outcome of the Appellant's independent cause of action and arguably created an unacceptable and impermissible appearance of impropriety in his continual monitoring and efforts to take control of the adjudication of this claim. See, attachment #4.

The Appellant herein commenced this independent action to demonstrate to the court the alleged misconduct and misrepresentation of the evidence filed with the District Court by the Defendants, and his reasonable reliance thereof.

It was the Appellant's prerogative to choose the manner in which to proceed with the underlying claim for redress by the Court, in light of the options available via the Federal Rules of Civil Procedure. The District Court Judge was not vested with the power to decide, at any particular instance, the procedural legal course the Appellant must take to challenge a prior court order when other legal options are available, merely to afford the prior Judge an opportunity to circumvent the Appellant's claim for relief.

The District Court Judge, in removing this case from the docket of another Judge and directing the same to his court without a proper order of the Court, abused his discretion and committed plain errors of law. The trial judge provided no notice and lawful order for his course of conduct; and his conduct was in violation of the court rules and federal statute regarding the random selection of Judges to hear and decide matters free of any particular interest or bias in the outcome. See, attachment #5.

The District Court Judge not only intervened in a matter not pending in his immediate court, but further engaged to restyle the Appellant's action as a Motion for Reconsideration which he would not reconsider. Under this procedural posturing, the Appellant should have been entitled to the court's most liberal reading of the allegations in his complaint. Crosby v. Holsinger, 816 F. 2d 162 (4th Cir. 1987). This conduct amounted to an abuse of the court's power and the Judge's discretion to hear and review independent actions for relief of judgment; and in the case at bar, this conduct requires reversal of the District Court's dismissal of the Appellant's action.

Issue 2: Did the District Court Judge commit error and abuse his discretion in transforming the Plaintiff's independ-

ent action for relief into a motion for his reconsideration?

Answer: Yes. Rule 59 and Rule 60 of the Federal Rules of Civil Procedure (F.R.C.P.), addresses the grounds and procedure for reconsideration and amendment of judgments by motion which invokes the exercise of the trial court sound discretion to amend or set aside its prior orders. In the case at bar, the Appellant does not move for reconsideration and amendment of the Summary Judgment order, but rather files an independent action to vacate said order as void and invalid, and as having been secure by fraud and misrepresentation not known by the Appellant at the time of Summary Judgment hearing.

The District Court Judge committed error and abused his discretion by attempting to transform the Appellants complaint to merely a motion to reconsider the previous order of the court. (See **order**, page 2). Rule 60 of the F.R.C.P., which provides additional grounds for relief from judgments as to the grounds set forth in Rule 59, F.R.C.P., specifically states in Rule 60(b) that it does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order or proceeding.

In the case at bar, the District Court Judge attempts to limit the Appellant's action to a motion for reconsideration and then exercises his discretion to adjudicate and rule, sua sponte, against the Appellant as a matter of law. The trial judge is without authority to transform the Appellant's independent cause of action to a discretionary motion and then accordingly decide the same erroneously upon the legal doctrine of res judicata.

Issue 3: Did the District Court Judge commit error and abuse his discretion by dismissing the Plaintiff's action, sua

sponte, prior to the matter become ripe for adjudication under the doctrine of res judicata?

Answer: Yes. The legal principles of res judicata are not applicable to the current action and it was not within the discretion of the District Court Judge to act, sua sponte and dismiss the Appellants action prior to the issues becoming ripe for adjudication.

The Defendants' motion to dismiss was based only upon improper venue. The issue of res judicata was not before the court and a ruling thereon was unwarranted. While a final judgment on the merits precludes a party from relitigating the same issues that were or could have been reasonable raised in that action, accordingly the doctrine of res judicata is not applicable where separated and distinct issues (i.e. misrepresentation) are raised by the conduct and action of separate and distinct parties not in privy to each other over issues which could not have been previously raised.

In the case at bar, the issues of fraud and misrepresentation in the securing of the Summary Judgment order were not a part of the issues of the underlying case referred to as "Dickey I," by the District Court Judge. (See **order**, page 1). In the current case, the complaint to vacate the Summary Judgment order involved complete and separate issues before the court that could not have been reasonably litigated in the prior case, and further involved the alleged conduct of a separate and distinct party (e.g. Willcox Law Firm) on behalf of the other Defendants.

The trial court could not reasonable conclude that the current action was nothing more than an attempt to relitigate the issues adjudicated in "Dickey I", in light of the pleadings on file, including the answer of the Defendants

wherein it is admitted that the Defendants relied in part on the deposition testimony of the Plaintiff and another witness. This is one of the salient non-litigated issues before the Court wherein the Appellant alleges that the deposition transcripts of the Plaintiff and another witness were not found in the court's records as represented to the Appellant and in the documentation of the court's records. See attachments, 1-3. This issue is clearly not subject to dismissal under the doctrine of res judicata.

A careful review of the Appellant's complaint and the Defendants' answer give rise to a justifiable controversy that was not yet ripe for adjudication on new, separate and distinct issues before the court. The legal doctrine of res judicata was clearly not applicable in the current independent action for relief of judgment, and the District Court Judge abused his discretion to preclude the introduction and development of evidence (e.g. transcripts of deposition testimony allegedly filed in the court) when he, sua sponte, dismissed the Appellant cause of action based on res judicata of issues not yet litigated and/or previously determined on the merits.

Issue 4: Did the District Court Judge commit error and abuse his discretion in proceeding with the adjudication and review of an independent action for relief from his orders while motions for his disqualification and recusal were pending?

Answer: Yes. Whenever a party to a proceeding in the District Court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further

therein, but another judge shall be assigned to hear such proceedings. See generally, 28 U.S.C.A. Section 144.

In the case at bar, the Appellant did not receive notice that his independent action had been direct to the District Court Judge - Duffy until an order of dismissal was sent during the Christmas holidays (received by Appellant on January 2, 1998). The Appellant immediately responded to this order with a Motion to Alter and Set Aside Judgment, followed by a Motion and Affidavit for disqualification and recusal of the presiding District Court Judge.

The Appellant, at the first opportunity, moved for recusal and disqualification of this presiding Judge who had demonstrated a personal interest and bias in the outcome of the action and who, without notice to the Appellant, directed that this independent action be removed from the docket of another Judge. Upon the filing of the Appellant's motion and affidavit of disqualification, the District Court Judge abused his discretion and committed an error of law by continuing to proceed with the case and immediately ruling on the Appellant's remaining motion before the court; and thereby mooting the Appellant's motion for disqualification and recusal.

The Appellant reasonably submit that it was reversible error for the trial judge to continue to proceed to review and adjudicate the matters in this action in such a manner as to moot the issue of his judicial bias and disqualification, and as such render the Appellant's cause of action and motion for disqualification ineffective for purposes of securing a fair and impartial hearing before another Judge on the merits of the case without further delay, cost and expense to the Appellant.

Accordingly, the District Court Judge should not have continued to proceed in the current action while a mo-

tion for his disqualification was pending, and thereby the orders of the Honorable Judge Patrick Duffy should be reversed.

Relief Requested:

The Appellant request that the Court of Appeals reverse and remand this case for hearing before the District Court of South Carolina - Columbia Division and conduct further proceeding according the Federal Rules of Court without further deliberation by the current trial Judge who in the interest of justice and fair administration of the Court's business, should consider recusal to avoid the appearance of impropriety.

Prior Appeals

A. Have you filed other appeals in this court? Yes.
B. 96-1805 Dickey v. City of Hartsville CA 93-1117-3-23

Disposition: Affirmed District Court's opinion based upon the review of the record.
Caveat: Record was incomplete and did not include the material evidence of Appellant's deposition which was represented as filed by the Defendants.

97-2434 Dickey v. City of Hartsville CA-23-1117-3-23

Disposition: Pending (Issue of Attorney Fees)

Conclusion:

The Appellant hereby submit that for the reasons

above stated, the attachments herein submitted and the complete record of the District Court (including the complete deposition transcripts allegedly filed) that the order of dismissal should be reversed, and/or in the alternative that this court grant oral argument for the full and clear presentation of the issues in this appeal as all the facts and legal contentions can not be adequately presented to the Court in this informal brief.

Respectfully submitted,

/s/ James H. Dickey
James H. Dickey, Pro Se
Post Office Box 2405
Atlanta, Georgia 30301
(404) 577-3817

Attachments Included:

#1 Motion for Summary Judgment representing deposition submitted to the court.
#2 Deposition of James H. Dickey (cover page). *
#3 Deposition of Rufus C. Streeter (cover page). *
#4 Motion to Disqualify Judge
#5 Notice and Motion for Recusal

* Official transcript not found in the Court records.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

97-2434 Dickey v. City of Hartsville
CA-93-1117-23

INFORMAL BRIEF

Jurisdiction:

Appellant appeals this case from the United States District Court of South Carolina-Columbia Division. The order of the Court for Attorney Fees, was entered on September 12, 1997. The order was timely appealed and docketed on October 22, 1997.

Brief Statement of Facts:

This action commenced in May 1993, by the Appellant, a Black United States citizen and attorney for violation of his civil rights, assault, battery and other misconduct by city officials in a rural town motivated primarily by racial prejudice to interfere with Appellant's repair and utilization of his commercial property. The Defendants, who had refused to comply with the Plaintiff's discovery request for over two years, filed a Motion for Summary Judgment the day before the case was ordered to be ready for trial and after the deadline for filing dispositive motions. The Summary Judgment Motion was granted by a newly assigned judge unfamiliar with the prior proceedings of the case, who subsequently awarded Defendants attorney fees against the pro se Appellant because he was an attorney. The Court ruled that the Appellant claims was without basis because the pro se Appellant failed to file discovery docu-

ments, etc., in response to the Defendants' Summary Judgement motion notwithstanding the representation by the Defendants that the discovery documents had been filed.

Issues on Appeal:

Issue 1. Did the District Court commit error and abuse its discretion by placing a greater duty upon the Appellant as a pro se litigant because of his status as an attorney than that which had been previously placed upon the Defense Law Firm?

Answer: Yes. The Appellant argued vehemently against the last minute reassignment of his case to a new and inexperienced Judge due to unfamiliarity of that Judge with the prior proceedings of the case. The Plaintiff had in excess of two years continued to request the assistance of the District Court to get the Defendants to comply with his reasonable discovery request, and it was not until August of 1995 that Defendants begin to fully comply with discovery. The Court had often assigned as "excusable neglect", Defendants' failure to comply with the discovery Rules of Court, while the Appellant continued to argue that his case was being prejudiced and intentionally delayed by Defendants if effort to alter or destroy material evidence.

The newly appointed judge was unfamiliar with this long history of discovery disputes wherein the duty upon the Defendants' attorneys were often relaxed in light of the greater degree of preparation and presentation of arguments by the pro se litigant. The newly assigned judge accepted without full knowledge of the history of this case, Defendants' version of the facts and Defendants' argument that the Plaintiff as a lawyer should be held to a higher stan-

dard than that of other pro se litigants. The court committed error by failing to recognize that the mere status as an attorney does not establish that the litigant has any special skills as a civil rights attorney in civil litigation; nor does it equate to equitable treatment of the pro se litigant where the court had continuously excused the failure to meet deadlines, to timely respond to discovery request, etc. by the opposing attorneys who had a complete staff to help specialize in civil rights litigation.

The District Court engaged in a gross abuse of discretion to hold this pro se litigant to a greater duty then that required of the Defendants' attorneys, (as it appears in this case) when the outcome of the case resulted from the misrepresentation of discovery documents allegedly filed with the court by the Defendants. (See, Defendants' Motion for Summary Judgment; exhibit number one—Deposition of James Dickey; exhibit number two—Deposition of Rufus Streeter). Attachment Number 1.

Issue 2: Did the District Court commit error and abuse its discretion in finding in its analysis that Plaintiff's claim was frivolous and objectively baseless?

Answer: Yes. The District Court incorrectly decided the facts in this case based upon the partial evidence filed with the Court by way of Affidavits of Defendants' witnesses (the least trustworthy) and the misrepresentation of the documents allegedly filed with the court by the Defendants. The Appellant did not realize until the end of a prior appeal on the merits of the Summary Judgment granted to Defendants that the official discovery documents (e.g. depositions) that the Defendants represented as filed with the court were not properly filed or were

withdrawn from the Court's records. It is now clear to the Appellant why the Defendants and the newly appointed judge attempted to make such an issue of the pro se litigant status as an attorney. The Defendants knowingly represented to the Court and the Plaintiff that they were filing the depositions of the Appellant and another witness from which evidence of material issues of facts in opposition to the Summary Judgment Motion did exist. The Defendants did not submit these official documents to the Court and as result the District Court was without any evidence to support the existence of genuine issues of material facts as argued by the Plaintiff.

The District Court thereby ruled in favor of Defendants based largely upon the self-serving affidavits of the Defendants' witnesses, notwithstanding references by both the Plaintiff and Defendants to the deposition testimony. The district court refused to allow the Plaintiff to state facts under oath at the Summary Judgment hearing and thereafter concluded that the Plaintiff produced no evidence to support his claim; and thus his action was frivolous and without basis. However, the Appellant submits that if the Court closes the door to the evidence proffered by the Plaintiff and permits the custodian of the records (e.g. Willcox Law Firm) to preclude the delivery of the official records to the court files; the net result is inescapable.

The Appellant submits that throughout his arguments against Summary Judgment he made continual reference to the evidence (e.g. deposition) on file with the Court. This should have reasonably alerted the Court that the Plaintiff was basing his contentions upon the depositions represented by the Defendants as filed with the Court. A reasonable inquiry into the location of these documents would have revealed that the Defendants apparently never filed the depositions and/or withdrew these documents from the Court's

consideration without the knowledge or consent of the Plaintiff.

In granting of the attorney fees, the Court at some juncture should have recognized that there were official evidence it had not considered in determining whether or not the Plaintiff's claim was frivolous. The Court recognized the sincerity of Plaintiff's arguments, but refused to consider the veracity of his statements by citing that the Plaintiff was not under oath. The Court thereafter validated the Defendants' false version of the facts of this case without any true inquiry into the merits of the case and without any true inquiry into all the equitable factors as cited in Barber v. Kimbrell's Inc., 577 F.2d 216 (1978), for granting attorney fees to the Defendants. As a result, the District Court committed error and abused its discretion in awarding payment of attorney fees under the circumstances.

Issue 3: Did the District Court commit error and abuse its discretion in failing to require compliance with the Local Court Rules regarding the award of attorney fees?

Answer: Yes. The District Court of South Carolina requires that the petition for Attorney Fees shall comply with the requirement set forth in Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978), shall state any exceptional circumstances and the ability of the party to pay the fee; and must be filed within thirty (30) days of the date of Judgment or Affirmance. The attorneys for Defendants failed to timely file with the Clerk of Court –Columbia Division, the petition for attorney fees until after the 30 day time period had expired and thereafter did not submit any affidavits regarding the total fees and cost, and the reasonableness and necessity of these fees for consideration until after an addi-

tional 45 days. The newly appointed judge could not have had any close and intimate knowledge of the efforts expended and the value of the service rendered by the attorneys for the Defendants and could not assume the appropriateness of granting any attorney fees without first having the proper evidence before the court. See Attachment #2.

The District Court rules clearly states that noncompliance with the appropriate time limits and requirements shall be deemed a waiver of any claims for attorney fees. Throughout this entire action favorable treatment has been extended to Defendants to file out of time motions in the District Court without sanction or penalty. Again, the Defendants either filed in a different division than where the action was pending or after the required deadline this motion and affidavit for attorney fees without waiver or penalty. The Petition for Attorney Fees failed to follow the required guidelines set forth in Barber v. Kimbrell's Inc., in a timely fashion; and as a result the District Court committed error and abused its discretion in granting attorney fees to Defendants based upon the documents submitted without full regard for the twelve factors relevant to the Court's determination of granting attorney fees.

Issue 4: Is the award of attorney fees under the facts and circumstances of the case unconscionable and against public policy?

Answer: Yes. Under the true facts and circumstances of the underlying case it would be unconscionable and against public policy to award the Defendants' attorney fees in an amount calculated to punish the Plaintiff for asserting his constitutional right to the equal protection of laws and freedom from the interference of racially motivated conduct

by government officials in rural towns.

A substantial history of government misconduct occurs in small rural communities where the rights of the local citizens take a back seat to the corrupt conduct of the government officials. This misconduct is particularly evident after a natural disaster wherein substantial government funds are made available to the public to rebuild, repair and restart. While often the local government officials are the gate keepers for revitalization and rejuvenation of the local communities, corrupt hands in government will often seek and take advantage of opportunities for personal aggrandizement through the misuse and abuse of their office and power. This was substantially the type of action brought by this Plaintiff in this case at bar. Prior to this action, the Plaintiff had no history of bringing civil rights claims against city officials notwithstanding many opportunities to do such; and further the Plaintiff sent notice to the city officials of the alleged misconduct to avoid litigation. The Court failed to make any inquire into the true facts and circumstances surrounding this action and the desirability within the legal and public community to have someone stand against the misconduct of certain government officials.

The award of attorney fees under the circumstances of this case would be contrary to public policy and would only serve to discourage similar victims of racist motivated conduct from seeking redress from the court system.

Relief Requested:

The Appellant request that the Court of Appeals reverse and vacate the Order of Award of Attorney Fees as untimely, unconscionable and contrary to public policy; and for any other reason the Court deem appropriate in addition to the reasons above stated.

Prior Appeals:

A. Have you filed other appeals in this court? Yes.

B. 96-1805 Dickey v. City of Hartsville CA-93-1117-3-23

Disposition: Affirmed District Court's opinion based upon the review of the record.

Caveat: Record was incomplete and did not include the material evidence of Appellant's deposition which was represented as filed by the Defendants.

Conclusion:

The Appellant urge this Court to grant oral argument for a full presentation of the issues in this appeal as all the facts and all legal contentions can not be adequately presented to the Court in this informal brief format.

The Appellant submits that given the nature of the dispute, the manner in which the Defendants were able to deceptively obtain a Summary Judgement Order, and the other equitable factors the Court was required to consider and did not; it was error and an abuse of discretion to award attorney fees to Defendants in any amount; and particularly in the amount as entered in this case since the Appellant has already been financially devastated by the conduct of the Defendants.

Respectfully Submitted,

/s/ James H. Dickey
James H. Dickey, Pro Se

Attachments Included:

#1 Motion for Summary Judgment representing deposition submitted to the court.
#2 Affidavit for Attorney Fees.
#3 Motion for Attorney Fees Received July 11, 1997.
#4 Deposition of James H. Dickey (cover page).
#5 Deposition of Rufus C. Streeter (cover page).

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

James H. Dickey,	)	
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT TO
	)	
City of Hartsville, Members of the City Council, Willie D. Herbert, individually and in his official capacity as City Building Inspector, Business License Inspector of the City of Hartsville, William F. Bruton, Jr., individually and in his official capacity as City Manager of the City of Hartsville, and Matt Cannarella, individually and as Mayor of the City of Hartsville, Willcox, McLeod, Buyck and Williams, P.A.	)	VACATE ORDER OF SUMMARY JUDGMENT
	)	
Defendants.	)	

The plaintiff, above, complaining of and against the above named Defendants and their attorneys in civil action 3:93 cv 1117 request relief from judgment and damages as set forth herein and alleges as follows:

(And as appears more fully from affidavits)

1) On April 1, 1996, in an action in the United States District Court of South Carolina—Columbia Division, original case number 93 cv 1117.OBD, Summary Judgment was entered for the City of Hartsville, et. al. And an order and judgment for attorney fees was entered on September 12, 1997 against the Plaintiff herein; all signed by District Court Judge, P. Duffy.

2) These orders and judgment are in violation of the federal laws and rules of court, and are still in full force and effect.

3) These judgments and orders should be vacated and set aside pursuant to the reasoning and objectives of Rule 1 and other Federal Rules of Civil Procedure, and upon the following:

A. The Order of Summary Judgment entered by the court was secured by fraud and misrepresentation of the evidence on file with the District Court.

To wit:

I. On or about January 31, 1996, the Defendants and their attorneys filed and/or represented to the court as filed in their motion for Summary Judgment, Plaintiffs deposition and that of another key witness as a basis for relief.

II. On or about January 31, 1996, the Defendants and their attorneys knew or should have known their dispositive motion for Summary Judgment was untimely,

and thereafter filed their motion in the Florence Division of the District Court to subvert the integrity of the court and/or misrepresent the timely evidence submitted to the District Court-Columbia Division.

III. On or about February 6, 1996, the Defendants and their attorneys engaged in exparte communication with the Clerk of Court's office for the Columbia Division to circumvent the untimely filing of their motion in the proper court, and thereafter continued to misrepresent the evidence and documents filed as the basis for the Summary Judgment motion.

IV. On and around February/March, 1996 the Defendants and/or their attorneys either withdrew material evidence (e.g. depositions) from the court and/or the courts consideration, which would clearly establish genuine issues of material facts to defeat Defendants motion for Summary Judgment; or failed to take steps to correct their misrepresentation of the documents filed as a basis for their motion.

V. On or about April 1, 1996, the court entered an order for Summary Judgment without full benefit and review of material evidence suppressed by Defendants in effort to mislead the court into rendering Summary Judgment.

B. The Plaintiff-Pro Se reasonably relied upon the representation of the attorneys and officers of the court as to the documents (e.g. depositions filed with the court and is tantamount to excusable neglect).

I. The depositions represented by the Defen-

dants as filed with the court was the basis of arguments regarding Summary Judgment in the memorandum of both parties filed with the court.

II. On or about March 22, 1996, the Plaintiff did not receive reasonable notice of Summary Judgment hearing until the day of the hearing, and the refusal of the court to grant a continuance for further clarification and preparation amounted to ambush and surprise by Defendants, their attorneys and the court to secure an order of Summary Judgment without benefit of a full record on the evidence taken and/or discovered.

III. On and about January 31, 1996, the Defendants and their attorneys used as a basis for their motion and argument for Summary Judgment evidence taken from the depositions of the Plaintiff and another key witness without submitting the depositions for the courts evaluation and/or withdrawing from the court's files and records, these exhibits represented by the Defendants' attorneys as filed with the court.

C. **The order of Summary Judgment and order for attorneys fees secured by the Defendants and their attorney are void and/or voidable.**

To wit:

I. On March 22, 1996, the District Court entertained Defendants' untimely motion for summary Judgment without leave of court and contrary to the scheduling order of the assigned Judge.

II. The order of Summary Judgment was entered

by a Judge not familiar with all prior orders and proceedings of the case and/or reassigned to the case without an order of the court, after the litigation process had commenced.

III. On or about May 28, 1996, the District Court entertained Defendants' untimely motion for attorneys fees without leave of court; and without jurisdiction the District Court granted an extension of time for Defendants to request attorneys fees.

IV. On or about July 10, 1997 and after the appeal, the attorney for the Defendants filed a motion for attorney fees in the Florence Division of the District Court for consideration by the District Court-Columbia Division which failed to timely comply with the District Courts requirements on petitioning for attorney fees.

V. On or about September 12, 1997, the District Court entered an order of attorneys fees after receiving an untimely affidavit by the attorneys and without any statement or evidence regarding the Plaintiff's ability to pay the fee; and/or after jurisdiction to the case had been closed.

D. The Order of Summary Judgment and Order for Attorneys Fees were secured by other misconduct of Defendants and/or their attorneys.

To wit:

I. That throughout the discovery process the Defendants engaged in the removal and/or displacement of city records and evidence from the ordinary order and/or files held by the city to prevent Plaintiff's timely discovery of documentation to support the Plaintiff's claim of civil

rights violation for clear presentation to the court.

II. That throughout the discovery, the Defendants and/or their attorneys engaged in conduct to subvert the integrity of the discovery process by refusing to timely supply the requested documents under the request for production, and submitting Summary Judgment affidavits in bad faith representing as fact matters and/or documents which did not exist or were unavailable to Plaintiff at the time of discovery request.

III. That by the time of the Summary Judgment hearing the Defendants and/or their attorneys had concealed, altered and/or suppressed material evidence under the Motion for Summary Judgment and the discovery process, in effort to mislead the court (e.g. candor) into rendering Summary Judgment for the Defendants and to subvert the integrity of judicial process.

Wherefore, Plaintiff prays for judgment vacating and setting aside the Order of Summary Judgment and Order of Attorney Fees against Plaintiff as manifestly unjust, prays for an order restoring Plaintiff's case to the trial calendar of this court, and for an order granting such other relief as the court deems just and equitable, including additional money damages against the Law Firm in this action for the additional cost and delays they have caused thereby in the presentation of this claim.

Respectfully submitted,

/s/ James H. Dickey
James H. Dickey, Pro Se

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JAMES H. DICKEY, Plaintiff, V. CITY OF HARTSVILLE, MEMBERS OF THE CITY COUNCIL, WILLIE D. HERBERT, individually and in his official capacity as City Building Inspector, Business License Inspector of the City of Hartsville, WILLIAM F.BURTON [sic], JR., individually and in his Official capacity as City Manager of the City of Hartsville, and MATT CANARELLA, individually and as Mayor the City of Hartsville, Defendants.	) C/A No. 3:93-1117-23)))))))))))))))))))	DEFENDANTS MOTION SUMMARY JUDGMENT

The Defendants, by and through the undersigned, respectfully move, pursuant to FED. R. CIV. P. 56(b), for summary judgment in the above-entitled matter on the

grounds that there is no genuine issue of material fact and that the movants are entitled to judgment as a matter of law. The reasons therefor are more fully explicated in the attached memorandum of law. In support thereof the Defendants submit the following:

(1) Deposition of James H. Dickey;

(2) Deposition of Rufus Streeter;

(3) Affidavit of Willie Herbert;

(4) Affidavit of William F. Bruton, Jr.;

(5) Affidavit of Pam Sansbury;

(6) Affidavit of Daniel W. McElmurray;

(7) Affidavit of Bobby Dempsey;

(8) Affidavit of Earl Hannibal;

(9) Affidavit of Tommy Lewis;

(10) Affidavit of Alan Rolfe;

(11) Affidavit of Bryan Griggs;

(12) Affidavit of Aaron Howard;

(13) Affidavit of William Canon, Jr.;

(14) Affidavit of Enoch Edwards, Jr.;

(15) City of Hartsville Business License Ordinance;

(16) City of Hartsville Landscape and Buffer Ordinance;

(16) City of Hartsville Comprehensive Zoning Ordinance;

WHEREFORE, the Defendants respectfully request that this Honorable court dismiss this matter in its entirety, with prejudice, on the grounds that the Defendants are entitled to judgment as a matter of law.

WILLCOX, McLEOD, BUYCK & WILLIAMS, P.A.

BY: /s/ Robert T. King
ROBERT T. KING #6133

BY: /s/ L. Hunter Limbaugh
L. HUNTER LIMBAUGH
P.O. Box 190
Florence, SC 29503-1909
(803) 662-3258
ATTORNEY FOR DEFENDANTS

January 31, 1996

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
3:93-1117-OBD (23)

James H. Dickey, Plaintiff, v. City of Hartsville,. Members of the City Council, Willie D. Herbert, individually and in his official capacity as City Building Inspector, Business License Inspector of the City of Hartsville, Williain F. Bruton, Jr., individually and in his official capacity as City Manager of the City of Hartsville, and Matt Canarella, individually and as Mayor of the City of Hartsville, Defendants.	Response and Memorandum Opposing Defendants' Motion for Summary Judgment

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Plaintiff hereby submits that defendants' motion for summary judgment is untimely and should be denied as there are several genuine issues of material fact to which the de-

fendants have failed to demonstrate the absence thereof, and therefore are not entitled to summary judgment as a matter of law.

FACTUAL BACKGROUND

The plaintiff is a Black US citizen, who grew up in the city of Hartsville, Darlington County, state of South Carolina, and is now a resident and domicile of the state of Georgia. The plaintiff, d.b.a. Dickey's Business Enterprise, owns and have maintained commercial rental property in the city of Hartsville, Darlington County for over 10 years. In 1983, Plaintiff purchased said property for the primary purpose of operating a law office and receiving rental income. In 1989, said property was damaged by a natural disaster (e.g. Hurricane Hugo) to which plaintiff sought repairs and improvements. The subject property and the operation of plaintiff's businesses is the subject of this lawsuit.

[Due to the limited time plaintiff has been given to respond to defendants' Motion; please see plaintiff's complaint on file for further review of the factual background in this case. Contrary to the factual background as asserted by defendants, this court will discover that defendants version of the facts further demonstrates several disputable issues of material fact which a jury will need to decide.]

ARGUMENT

Legal Standard

Summary Judgment may be granted under Rule 56(c), F.R.C.P. where the moving party demonstrate that

there is no genuine issue as to any material fact and that the moving party is entitled to Judgment as a matter of law.

It should be clear to this court that the defendants' as the moving party bears the initial burden of demonstrating that there is no genuine issue as to any material fact. However, defendants' argument merely by- passes their own burden of proof by offering a series of self-serving affidavits (the least trustworthy) to support the defendants' version of the facts, so as to place the burden of proof upon plaintiff to produce evidence to establish his claim. Plaintiff hereby submit that defendants have failed to meet their initial burden under the proper Summary Judgment Standard of review, which is not based upon the case of Celotex v. Catrett, 477 U.S. 317 (1986). Plaintiff further submit that defendants' motion is untimely and is not subject to consideration by this court.

Argument 1: Defendants failed to timely filed dispositive motion for summary judgment.

The Court establish and pronounced at a prior hearing the final scheduling order for this case. The plaintiff hereby submits that said order required that all dispositive motions be filed in this court by January 15, 1996. The defendants filed this motion for Summary Judgment purportedly on January 31, 1996; which is at least 16 days beyond the date ordered by the court. The record will reflect that at most of the prior hearings, defendants have either disregarded or failed to comply with the Order of this court or Federal Rules of Civil Procedure, without penalty or consequence. The plaintiff has continually urged this Court to review certain "strange occurrences" taking shape in this case and remove the appearance of impropriety in over looking defendants' continual failure to timely file documents and in granting

leave to defendants without justifiable excuse or request.

Defendants must again seek special treatment from this court to have this court review their motion for summary judgment which must be denied with prejudice. Rather than request additional time to file its dispositive motions, defendants have again chosen to file its motion in the wrong division and beyond the ordered time limit.

The continual failure of the defendants to timely file its documents and motions in the proper court is beyond excuse; and it would be a clear abuse of discretion to ignore again defendants' conduct and to hear this motion for Summary Judgment. The court should note that this latest episode of defendants' conduct further exacerbate plaintiffs concerns regarding the last minute reassignment of this entire case, which was already scheduled and ordered to be ready for trial before a judge who was familiar with the history and facts of the prior proceedings, after notice of the hearing was already delivered to the parties. Under the current order of the District Court Judge, defendants' motion must be denied with prejudice, for failure to timely file. (1)

Argument II: Defendants' fail to demonstrate the absence of any genuine issue of material fact.

The record submitted by the defendants to demonstrate that the requirements of Rule 56(c) have been met barely scratch the surface of carrying the burden of a moving party under Rule 56(c) F.R.C.P. Defendants' arguments are based merely on the self-serving affidavits of the defendants,

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(1) Again, plaintiff must respectfully urge this court to remove all appearance of impropriety which may appear in the just administration of this case and rescind any reassignment made in an untimely manner.

their agents or individuals who are a part of the alleged conspiracy or who have a vested interest to keep the defendants happy. These type of affidavits, as a general proposition provides the least trustworthy basis for granting summary judgment. The plaintiff reasonably believes and submit that these affidavits were made in bad faith and will seek severe sanctions and monetary damages against Defendants and/or their counsel upon subsequent proof.(2) The plaintiff, who certainly have personal knowledge of the facts of this claim hereby submit that several of the affidavits submitted contain false allegations made under oath, and move to strike the affidavits as defective and constituting sworn testimony of facts which are false. More importantly, the orchestrated facts prepared in the defendants' affidavits does not negate the existence of plaintiffs material facts but merely offers as conclusive, allegations that addresses their version of the facts. Such an effort by defendants merely goes to substantiate the existence of genuine issues of material facts for a jury to decide; and not the absence thereof. Ex: See, Exhibits and Affidavits on file.

In addition to the argument above, the record of Deposition Testimony and the exhibits as set forth by defendants further substantiate the existence of material facts for a jury to decide, and not the absence thereof. Ex: See, Depositions, Exhibits, and Affidavits on file.

The plaintiff further submit that the evidence in the record, the answers and responses to discovery on file dem-

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(2) The plaintiff has previously place defendants' law firm on notice of improper conduct by either members of the law firm or the defendants they represent; and upon completion of trial in the case at bar a subsequent hearing may be necessary to resolve these assertions.

onstrates more highly and have more probative value on the existence of material issues of fact for a jury to decide than the batch of affidavits presented by defendants. Upon review of the answers, and responses to discovery on file, the court can clearly discern the existence of genuine issues of material facts for jury consideration. Ex: See Exhibits, and Affidavits on file.

The court should note that defendants still have the burden of clearly establishing the lack of any triable issue in a Summary Judgment proceeding, even though the plaintiff (party opposing motion) would have at trial the burden of proof on a particular issue. Tobey v. Extel/JWP., Inc., 985 F2d. 330 (7th Cir. 1993). This language is contrary to the approach the defendants wish for this court to take in regards to its summary judgment evaluation.

Argument III: All evidence must be viewed in the light most favorable to the non-moving party.

A review of the established facts as set forth by the defendants which are not contained in their spoiled affidavits establishes the existence of genuine issues of material facts for a jury to decide. Upon careful review of Defendants' affidavits and exhibits, this court will observe disputable issues of facts and thus preclude defendants from Summary Judgment as a matter of law. Plaintiffs deposition on file (or will be submitted to the court at the time of oral hearing) provided substantial testimony different from that submitted in the affidavits and deposition of defendants and their witnesses. The court in this circuit has previously held in an action alleging racial discrimination, that plaintiff's un-corroborated testimony is sufficient to create a genuine issue as to whether the defendants purposefully discriminated

against the plaintiff. See, Summerlin v. Edgar, 809 F.2d 1034 (4th Cir. 1987). In the case at bar, it is clear throughout plaintiffs deposition, that he represent a different set of facts than that which is offered by defendants via their affidavits and deposition testimony. Therefore, this court is required in this summary judgment proceeding to view the evidence in the light most favorable to the plaintiff, Summerlin, 809 F.2d 1034. And accordingly, Summary Judgment in favor of Defendant must be denied since there are disputed facts which all must be resolved in favor of the Plaintiff, until heard by a jury. See United States v. Dehold, 369 U.S. 654 (1962).

Argument IV: Summary judgment precludes the court from making findings on the merits of the facts.

In Summary Judgment proceedings the district court can not resolve genuine factual issues in favor of the moving party. Southwest Marine, Inc. v. Gizoni, 112 S.Ct. 486 (1991). In the case at bar, defendants seek to have this court decide issues of facts according to the standard set forth in Celotex , which is clearly the exception and not the rule in regards to summary judgment proceedings. The arguments of defendants assumes disputed facts as true and impliedly request that this court accept their version of the facts as the basis for its subsequent legal arguments in attempts to place the burden upon the non-moving party to present his case.

EXAMPLE: Defendants assert that plaintiffs municipal liability claim must fail because there has been no constitutional violation and that defendant,Willie Herbert is not a policymaker for the purposes of municipal liability.

Self-serving affidavits, which are created for the very purpose of having this court conclude and accept as true the assertions of fact of the defendants merely because they are given under oath, is insufficient for granting summary judgment in lieu of plaintiff's deposition testimony without the introduction of more probative evidence. (3) The defendants offers no outside proof or evidence of the facts they purport beyond these affidavits of conclusory statements.

All of the facts which suggest that there has been no violation of plaintiffs constitutional rights are derived directly from the batch of affidavits presented by defendants in attempting to dispel or point out no genuine issue of material fact. However the opposite has occurred; the court now have statements made under oath in direct contradiction to plaintiff's pleadings and deposition testimony. These asserted facts does not disprove plaintiffs claim but merely illustrate the existence of genuine issues of material facts for a jury to decide. Ex: See Exhibits and affidavits on file.

The defendants assert that Willie Herbert is not a policy maker for purposes of municipal liability as a matter of state law. Although state law will ~~natura~~lly be the appropriate point, whether or not a municipal tort feasor actually has policy making authority is ultimately an issue for the fact finder. St. Louis v. Praprotnik, 485 U.S. 112 (1988). Federal Courts have well recognized that this is a material issue for a jury to decide. See, Southwest Marine, Inc., Id, 112 S. Ct. 486 (1991).

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(3) Plaintiff gives notice to the court and defendants, of his intent to request the most severe sanctions from the defendants and their attorneys (Willcox Law Firm) if said affidavits are proven to contain blatantly false assertions.

Argument V: Summary Judgment is not proper in certain complicated cases involving important civil rights and constitutional issues.

The court may exercise sound discretion in denying summary judgment in certain complicated civil rights cases. Plaintiff has submitted from the very beginning that this is a complicated civil rights case involving third party beneficiaries, denial of benefits of government funding through the community development block grant programs (CDBG) etc., conspiracy, payoffs\kickbacks, selective administration and enforcement of codes and intimidation, inter alia. It is clear that defendants would like to have the plaintiff try this case in a summary judgment proceeding wherein the defendants upon failure at the summary judgment hearing will have another opportunity to orchestrate a defense to plaintiff's claim. The plaintiff is unwilling to be inticed into carrying the defendants burden by proving his case at a Summary Judgment proceeding, when the defendants have failed to demonstrate the absence of any genuine issue of a material fact.

The defendants' offer to this court a host of arguments on what the plaintiff must prove to establish his case and then point to a controverted factual allegation in one of its orchestrated affidavits as a basis for concluding that there are no genuine issues of material fact for a jury to decide and that they are entitled to summary judgment as a matter of law.

EXAMPLE: Defendants' assert that certain individual defendants simply did not engage in intentional discrimination against plaintiff, and as such plaintiffs equal protection claim must fail.

The federal court has consistently held that equal protection violation may occur through the administration or enforcement of its laws by unequal application favoring one class of persons and disfavoring another. See, Sylvia Development Corp. v. Calvert,Maryland. 78 F. 2d. 810, (4th Cir. 1995). The plaintiffs deposition testimony, the pleadings, and discovery responses on file substantiates the existence of a genuine issue of material fact regarding the selective application and enforcement of city codes and regulations. Notwithstanding defendants' affidavits which speak to the contrary, a genuine issue of material fact still remains.

The defendants' method of argument is based on assumed underlying facts, and seems to characterize defendants' entire approach to this Summary Judgment motion. Such an approach must assume that this court in its discretion will accept defendants' underlying version of the facts as true. However, this court can not engage in such an endeavor of discretion. The plaintiff request careful observation from this court of these underlying facts so as not to be misled by defendants' arguments.

The federal court have well recognized that discretion plays no role in the granting of summary judgment. Summary judgment must be proper under the general principles and standards of Rule 56(c) F.R.C.P., and not the exception as identified by defendants' in Celotex Corp., supra.

EXAMPLE: Defendants' assert under the theory of qualified immunity that even if officials may have erred in attempting to enforce the city's codes and ordinances, their actions, and any such errors were clearly reasonable.

However, the federal court have affirmatively held that where there are genuine issues of historical fact regarding an official conduct or its reasonableness under the circumstances, summary judgment is not appropriate and the issue must be reserved for trial. See, Pritchett v Alford, 973 F2d. 307 (4th Cir. 1992).

While the district court may not exercise discretion in granting summary judgment, it may exercise sound discretion in denying summary judgment in certain situations, particularly where the court is not reasonably certain that there is no triable issue of fact. In the case at bar, defendants have denied the very essence of plaintiffs claim e.g. receiving CDBG Funds, application for business licenses, the existence of his law office, etc., only to selectively acknowledge at a later point the existence thereof. Throughout the discovery process plaintiff has complained of the delay tactics utilized by defendants before revealing the information requested and the destruction and\or alteration of documents. Plaintiff would urge that summary judgment would be highly improper under these circumstances and in this case involving complexed civil rights issues with substantial constitutional ramifications.

Furthermore, Defendants have continually vacillated on their answers and responses to discovery, which purportedly was given under oath. See defendants' answer on file, and defendants' answers and supplemental answer to plaintiffs interrogatories, e.t.c. The defendants have given equivocal answers to plaintiff's discovery request, and as a result of defendants' equivocation of the facts, the court cannot judge which facts to believe. This case is therefore not suitable for Summary Judgment adjudication under the current circumstances.

CONCLUSION

In the case at bar, there are several triable issues for a jury to resolve that overwhelmingly precludes the grant of summary judgment in favor of defendants; and if in doubt, the court should exercise its sound discretion in this complicated civil rights case, and deny summary judgment as a matter of judicial prudence.

Respectfully Submitted,

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